

REPORTS
OF
Cases Argued and Determined
IN THE
COURT of CLAIMS
OF THE
STATE OF ILLINOIS

VOLUME 23

Containing cases in which opinions were filed and
orders of dismissal entered, without opinion,
between September 1, 1958 and June 30, 1960

SPRINGFIELD, ILLINOIS
1960

[Printed by authority of the State of Illinois.]

PREFACE

The opinions of the Court of Claims herein reported are published by authority of the provisions of Section 18 of an Act entitled “An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named”, approved July 17, 1945.

CHARLES F. CARPENTIER,
*Secretary of State and
Ex Officio Clerk of the
Court of Claims*

OFFICERS OF THE COURT

JUDGES

JOSEPH J. TOLSON, *Chief Justice*
Kankakee, Illinois

GERALD W. FEARER, *Judge*
Oregon, Illinois

JAMES B. WHAM, *Judge*
Centralia, Illinois

LATHAM CASTLE, *Attorney General*
January 12, 1953 – May 8, 1959

GRENVILLE BEARDSLEY, *Attorney General*
May 9, 1959 – June 3, 1960

WILLIAM L. GUILD, *Attorney General*
June 17, 1960 –

CHARLES F. CARPENTIER
Secretary of State and Ex Officio ~~Clerk~~ of the Court

ALFRED H. GREENING, *Deputy Clerk*
Springfield, Illinois

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

TERMS OF COURT

Rule 1. The Court shall hold a regular session at the Capital of the State on the second Tuesday of January, May and November of each year, and such special sessions at such places as it deems necessary to expedite the business of the Court.

PLEADINGS

Rule 2. Pleadings and practice, as provided by the Civil Practice Act of Illinois and the Rules of the Supreme Court of Illinois, shall be followed except as herein otherwise provided.

Rule 3. The original and five (5) copies of all pleadings shall be filed with the Clerk at Springfield, Illinois. In order that the files in the Clerk's office may be kept under the system, commonly known as "flat filing", all papers presented to the Clerk shall be flat and unfolded. Such papers need not have a cover.

Rule 4. (a) Cases shall be commenced by a verified complaint, which shall be filed with the Clerk of the Court. A party filing a case shall be designated as the claimant, and either the State of Illinois, The Board of Trustees of the University of Illinois, The Board of Trustees of Southern Illinois University or The Teachers College Board, as the case may be, shall be designated as the respondent. The Clerk will note on the complaint, and each copy, the date of filing, and deliver one of said copies to the Attorney General; or to the Legal Counsel of either The Board of Trustees of the University of Illinois, The Board of Trustees of Southern Illinois University or The Teachers College Board. Joinder of claimants in one case is permitted, as provided by the Civil Practice Act of Illinois. A claimant, or his attorney, may sign the complaint, and any person with knowledge of the facts therein set forth may verify a complaint.

(b) In all cases filed in this Court, all claimants not appearing pro se must be represented of record by a member of the Illinois Bar residing in Illinois. Any attorney in good standing, duly admitted to practice in the State where he resides, may, upon motion, be permitted to appear of record, and participate

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in a particular case. If the name of a resident Illinois attorney appears on a complaint, no written appearance for such attorney need be filed, but withdrawal and substitution of attorneys shall be in writing, and filed in the case.

(c) The complaint shall be printed or typewritten, and shall be captioned substantially as follows:

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

A.B.,	
	Claimant
vs	
STATE OF ILLINOIS, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, THE BOARD OF TRUSTEES OF SOUTH- ERN ILLINOIS UNIVER- SITY or THE TEACHERS COLLEGE BOARD.	No.
	Respondent

Rule 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and, if so presented, he shall state when, to whom, and what action was taken thereon.

(b) The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State, The Board of Trustees of the University of Illinois, The Board of Trustees of Southern Illinois University or The Teachers College Board, what persons are owners thereof, or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of the claim, or any part thereof, or interest therein, has been made, except as stated in the petition; that the claimant is justly entitled to the amount therein claimed from the State of Illinois, The Board of Trustees of the University of Illinois, The Board of Trustees of Southern Illinois University or The Teachers College Board, after allowing

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all just credits; that claimant believes the facts stated in the petition to be true. If the claimant shall, after the filing of his complaint in the Court of Claims, commence a proceeding in another tribunal against any other person or persons for damages arising out of the same transaction, then, in that event, the complaint pending in the Court of Claims will be continued generally until the final disposition of said proceeding.

(c) If the claimant bases his complaint upon a contract, or other instrument in writing, a copy thereof shall be attached thereto for reference.

Rule 6. A bill of particulars, stating in detail each item of damage, and the amount claimed on account thereof, shall be attached to the complaint in all cases.

Rule 7. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a duly certified copy of the record of appointment must be filed with the complaint.

Rule 8. If the claimant dies pending the suit, the death may be suggested on the record, and the legal representative, on filing a duly certified copy of the record of appointment as executor or administrator, may be admitted to prosecute the suit by special leave of the Court. It is the duty of the claimant's attorney to suggest the death of the claimant when that fact first becomes known to him.

Rule 9. Where any claim has been referred to the Court by the Governor, or either House of the General Assembly, any party interested therein may file a verified complaint at any time prior to the next regular session of the Court. If no such person files a complaint, as aforesaid, the Court may determine the case upon whatever evidence it shall have before it, and, if no evidence has been presented in support of such claim, the case may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

Rule 10. A claimant desiring to amend his complaint may do so at any time before he has closed his testimony without special leave, by filing the original and five (5) copies of an amended complaint, but any such amendment shall be subject to the objection of the respondent, made before or at final hear-

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ing. Any amendments made subsequent to the time the claimant has closed his testimony must be by leave of Court.

Rule 11. The respondent shall answer within thirty (30) days after the filing of the complaint, and the claimant may reply within fifteen (15) days after the filing of said answer, unless the time for pleading be extended; provided that, if the respondent shall fail so to answer, a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

EVIDENCE

Rule 12. At the next succeeding session of the Court after a case is at issue, the Court, upon the call of the docket, shall assign the case to a commissioner, who, within a reasonable time, shall set the time and place for the hearing, and notify opposing counsel in writing. If the Court, or a Judge thereof, decides to hear a case, the Clerk will send out notices of the time and place of the hearing.

Rule 13. (a) All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. When the evidence is taken, and the proofs in a case are closed, the evidence shall be transcribed, and the original and two (2) copies thereof shall be filed with the Clerk within twenty (20) days of the completion of the hearing.

(b) The format of the transcript of evidence shall conform to that of court reporters as nearly as practicable. Double spacing shall be used for each question and answer, and double or triple spacing shall be used between each question and answer. Letter or legal size paper shall be used, and margins shall be of suitable size.

(c) An index, identifying the names of the witnesses, shall be included in the transcript of evidence. The index shall further disclose the pages on which the testimony of each witness appears.

Rule 14. All costs and expenses of taking evidence on behalf of the claimant shall be borne by the claimant, and the costs and expenses of taking evidence on behalf of the respondent shall be borne by the respondent.

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Rule 15. If either party fails to file the evidence as herein required, the Court may, in its discretion, proceed with its determination of the case.

Rule 16. All records and files maintained in the regular course of business by any State Department, commission, board or agency of the respondent, the State of Illinois, The Board of Trustees of the University of Illinois, The Board of Trustees of The Southern Illinois University or The Teachers College Board, and divisions and agencies under the control of such Boards of Trustees, and all departmental reports made by any officer thereof relating to any matter or case pending before the Court shall be prima facie evidence of the facts set forth therein; provided, a copy thereof shall have been first duly mailed or delivered by the Attorney General or the Legal Counsel of either The Board of Trustees of the University of Illinois, The Board of Trustees of The Southern Illinois University or The Teachers College Board, to the claimant, or his attorney of record, and the original and four (4) copies filed with the Clerk.

Rule 17. (a) In any case in which the physical condition of a claimant or claimants is in controversy, the Court may order him, or them, to submit to a physical examination by a physician. The order may be made only on motion for good cause shown, and upon notice to the claimant to be examined, or his attorney, and to all other claimants, or their attorneys, if any, and shall specify the time, place, manner, conditions and scope of the examination, and the person or persons by whom it is to be made.

(b) If requested by the claimant examined, respondent shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request, and delivery to the claimant of such detailed written report, respondent shall be entitled, upon request, to receive from the claimant examined a like report of any examination previously or thereafter made of the same physical condition. If the claimant examined refuses to deliver such report or reports, the Court, on motion and notice, may make an order requiring delivery on such terms as are just, and, if a physician fails or refuses to make such a report, the testimony of such physician may be excluded, if offered at the hearing of the case.

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ABSTRACTS AND BRIEFS

Rule 18. In all cases where the transcript of the evidence, including exhibits, exceeds seventy-five (75) pages in number, claimant shall furnish in sextuplicate a complete typewritten or printed abstract of the transcript of the evidence, including exhibits, prepared in conformity with Rule 38 of the Rules of the Supreme Court of Illinois. The abstract must be sufficient to present fully all material facts contained in the transcript, and it will be taken to be complete, accurate and sufficient, unless respondent shall file a further abstract in conformity with said Rule 38.

Rule 19. Each party shall file with the Clerk the original and five (5) copies of a typewritten or printed brief setting forth the points of law upon which reliance is had, with reference made to the authorities sustaining their contentions. Accompanying such briefs, there shall be a statement of the facts, and an argument in support of such briefs. The original shall be provided with a suitable cover, bearing the title of the Court and case, together with the name and address of the attorney filing the same printed or plainly written thereon. The filing of brief and argument may only be waived by the party desiring to do so first obtaining consent of the Court upon good cause shown.

Rule 20. The abstract, brief and argument of the claimant must be filed with the Clerk on or before thirty (30) days after all evidence has been completed and filed with the Clerk, unless the time for filing the same is extended by the Court, or one of the Judges thereof. The respondent shall file its brief and argument not later than thirty (30) days after the filing of the brief and argument of the claimant, unless the time for filing the brief of claimant has been extended, in which case the respondent shall have a similar extension of time within which to file its brief. Claimant may file a reply brief within fifteen (15) days of the filing of the brief and argument of respondent. Upon good cause shown, further time to file the abstract or briefs of either party may, upon notice to the other party, be granted by the Court, or by any Judge thereof.

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EXTENSION OF TIME

Rule 21. Either party, upon notice to the other party, may make application to the Court, or any Judge thereof, for an extension of time within which to file any pleadings, papers, documents, abstracts or briefs. A party filing such a motion shall submit therewith an original and five (5) copies of the proposed order in the furtherance of said motion.

MOTIONS

Rule 22. (a) All motions shall be in writing. The original and five (5) copies of all motions, and suggestions in support thereof, shall be filed with the Clerk of the Court, together with proof of service upon counsel for the other party. When the motion is based upon matter that does not appear of record, it shall be supported by an affidavit. A copy of the motion, suggestions in support thereof, and affidavit, if any, shall be served upon counsel for the opposing party at the time the motion is filed with the Clerk.

(b) Objections to motions, and suggestions in support thereof, must also be in writing. An original and five (5) copies of all objections to motions shall be filed with the Clerk of the Court, together with proof of service upon counsel for the other party, within ten (10) days of the filing of the original motion. When motions are filed by either the claimant or the respondent, the moving party shall also submit an original and five (5) copies of the proposed order in the furtherance of said motion.

(c) There shall be no oral argument allowed on motions, or objections to motions.

Rule 23. In case a motion to dismiss is denied, the respondent shall plead within thirty (30) days thereafter, and if a motion to dismiss be sustained, the claimant shall have thirty (30) days thereafter within which to file an amended complaint. If the claimant fails to do so, the case will be dismissed.

ORAL ARGUMENTS

Rule 24. Either party desiring to make oral argument shall so indicate on the cover of his brief, or his petition for rehearing.

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REHEARINGS

Rule 25. A party desiring a rehearing in any case shall, within thirty (30) days after the filing of the opinion, file with the Clerk the original and five (5) copies of his petition for rehearing. The petition shall state briefly the points supposed to have been overlooked or misapprehended by the Court, with authorities and suggestions concisely stated in support of the points. Any petition violating this rule will be stricken.

Rule 26. When a rehearing is granted, the original briefs, if any, of the parties, and the petition for rehearing, answer, and reply thereto shall stand as files in the case on rehearing. The opposite party shall have twenty (20) days from the granting of the rehearing to answer the petition, and the petitioner shall have ten (10) days thereafter within which to file his reply. Neither the claimant, nor the respondent, shall be permitted to file more than one application, or petition for a rehearing.

Rule 27. When a decision is rendered, the Court, within thirty (30) days thereafter, may grant a new trial for any reason, which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

RECORDS AND CALENDAR

Rule 28. (a) The Clerk shall record all orders of the Court, including the final disposition of cases. He shall keep a docket in which he shall enter all claims filed, together with their number, date of filing, the name of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, in course, he shall stamp the filing date thereon, and forthwith mail to opposing counsel a copy of all orders entered, pleadings, motions, notices and briefs as filed; such mailing shall constitute due notice and service thereof.

(b) Within ten (10) days prior to the first day of each session of the Court, the Clerk shall prepare a calendar of the cases set for hearing, and of the cases to be disposed of at such session, and deliver a copy thereof to each of the Judges, the Attorney General, and to the Legal Counsel of The Board of Trustees of the University of Illinois.

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Rule 29. Whenever on peremptory call of the **docket** any case appears in which no positive action has been taken, and no attempt made in good faith to obtain a decision or hearing of the same, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the day set by the Court why such case should not be dismissed for want of prosecution, and stricken from the docket. Upon the claimant's failure to take some affirmative action to discharge or comply with said rule, such case may be dismissed, and stricken from the docket, with or without leave to reinstate on good cause shown. On application, and a proper showing made by the claimant, the Court may, in its discretion, grant an extension of time under such rule to show cause. The fact that any case has been continued, or leave given to amend, or that any motion or matter has not been ruled upon, will not alone be sufficient to defeat the operation of this rule.

FEES AND COSTS

Rule 30. The following schedule of fees shall apply:

Filing of complaint _____ \$ 0.00

Certified copies of opinions:

Five (5) pages or less _____ 0.25

For more than five (5) pages and not more than
ten (10) pages _____ 0.35

For more than ten (10) pages and not more than
twenty (20) pages _____ 0.45

For more than twenty (20) pages _____ 0.50

ORDER OF COURT

The above and foregoing rules, as amended, were adopted as rules, as amended, of the Court of Claims of the State of Illinois on the 27th day of June, A.D. 1958, to be in full force and effect from and after the 10th day of July, A.D. 1958.

COURT OF CLAIMS LAW

***AN ACT** to create the Court of Claims, to prescribe its powers and duties, and to repeal an act herein named.*

Section 1. The Court of Claims, hereinafter called the Court, is created. It shall consist of three judges, to be appointed by the Governor by and with the advice and consent of the Senate, one of whom shall be appointed chief justice. In case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in case of vacancy.

Section 2. Upon the expiration of the terms of office of the incumbent judges the Governor shall appoint their successors by and with the consent of the Senate for terms of 2, 4 and 6 years commencing on the third Monday in January of the year 1953. After the expiration of the terms of the judges first appointed pursuant to the provisions of this amendatory Act, each of their respective successors shall hold office for a term of 6 years and until their successors are appointed and qualified.

Section 3. Before entering upon the duties of his office, each judge shall take and subscribe the constitutional oath of office and shall file it with the Secretary of State.

Section 4. Each judge shall receive a salary of \$6,500.00 per annum payable in equal monthly installments. (As amended by Act approved July 21, 1959.)

Section 5. The Court shall have a seal with such device as it may order.

Section 6. The Court shall hold a regular session at the Capital of the State beginning on the second Tuesday of January, May and November, and such special sessions at such places as it deems necessary to expedite the business of the Court.

Section 7. The Court shall record its acts and proceedings. The Secretary of State, ex officio, shall be clerk of the Court, but may appoint a deputy, who shall be an officer of the Court, to act in his stead. The deputy shall take an oath to discharge his duties faithfully and shall be subject to the direction of the Court in the performance thereof.

The Secretary of State shall provide the Court with a suitable court room, chambers and such office space as is necessary and proper for the transaction of its business.

Section 8. The Court shall have jurisdiction to hear and determine the following matters:

A. All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workmen's Compensation Act or the Workmen's Occupational Diseases Act.

B. All claims against the State founded upon any contract entered into with the State of Illinois.

C. All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned; provided, the Court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than \$15,000.00; for imprisonment of 14 years or less but over 5 years, not more than \$30,000.00; for imprisonment of over 14 years, not more than \$35,000; and provided further, the Court shall fix attorney's fees not to exceed 25% of the award granted.

D. All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois, The Board of Trustees of Southern Illinois University or The Teachers College Board; provided, that an award for damages in a case sounding in tort shall not exceed the sum of \$25,000.00 to or for the benefit of any claimant. The defense that the State, The Board of Trustees of the University of Illinois, The Board of Trustees of Southern Illinois University or The Teachers College Board, are

not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

E. All claims for recoupment made by the State of Illinois against any claimant.

F. All claims for recovery of overpayment of premium taxes or fees or other taxes by insurance companies made to the State resulting from failure to claim credit allowable for any payment made to any political subdivision or instrumentality thereof. Any claim in this category, which arose after July 16, 1945 and prior to July 11, 1957, may be prosecuted as if it arose on July 11, 1957 without regard to whether or not such claim has previously been presented or determined. (As amended by Act approved July 8, 1959.)

(See also Section 1 of "An Act concerning claims for medical care or hospitalization of escapee from State charitable, penal or reformatory institution, etc." Approved June 8, 1953. Appendix p. 18.)

(See also Section 3 of "An Act terminating the Service Recognition Board, providing for the custody of its records, and providing for the transfer of funds in connection therewith." Approved May 20, 1953. As amended by Act approved May 25, 1955. Appendix p. 18.)

(See also Section 1 of "An Act Concerning damages caused by escaped inmates of charitable, penal, reformatory or other institutions over which the State has control." Approved June 21, 1935. As amended by Act approved June 30, 1953. Appendix p. 19.)

(See also Sections 52 and 53 of "An Act to establish a Military and Naval Code for the State of Illinois and to establish in the Executive Branch of the State Government a principal department which shall be known as the Military and Naval Department, State of Illinois, and to repeal an Act therein named." Approved July 8, 1957. Appendix p. 19.)

(See also Section 49 of "An Act to provide for the organization of the Illinois State Guard, and for its government, discipline, maintenance, operation and regulation." Approved May

18, 1943. Title as amended by Act approved August 2, 1951. Appendix p. 20.)

Section 9. The Court may:

A. Establish rules for its government and for the regulation of practice therein; appoint commissioners to assist the Court in such manner as it directs and discharge them at will; and exercise such powers as are necessary to carry into effect the powers herein granted.

B. Issue subpoenas to require the attendance of witnesses for the purpose of testifying before it, or before any judge of the Court, or before any notary public, or any of its commissioners, and to require the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it. In case any person refuses to comply with any subpoena issued in the name of the chief justice, or one of the judges, attested by the clerk, with the seal of the Court attached, and served upon the person named therein as a summons at common law is served, the circuit court of the proper county, on application of the clerk of the Court, shall compel obedience by attachment proceedings, as for contempt, as in a case of a disobedience of the requirements of a subpoena from such court on a refusal to testify therein.

Section 10. The judges, commissioners and the clerk of the Court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of them.

Section 11. The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of the claim or any part thereof or interest therein has been made, except as stated in the petition; that the claimant is justly entitled to the amount therein claimed from the State of Illinois, after allowing all just credits; and that claimant believes the facts stated in the petition to be true. The petition shall be verified, as to statements of facts, by the affidavit of the claimant, his agent, or attorney.

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Section 12. The Court may direct any claimant to appear, upon reasonable notice, before it or one of its judges or commissioners or before a notary and be examined on oath or affirmation concerning any matter pertaining to his claim. The examination shall be reduced to writing and be filed with the clerk of the Court and remain as a part of the evidence in the case. If any claimant, after being so directed and notified, fails to appear or refuses to testify or answer fully as to any material matter within his knowledge, the Court may order that the case be not heard or determined until he has complied fully with the direction of the Court.

Section 13. Any judge or commissioner of the Court may sit at any place within the State to take evidence in any case in the Court.

Section 14. Whenever any fraud against the State of Illinois is practiced or attempted by any claimant in the proof, statement, establishment, or allowance of any claim or of any part of any claim, the claim or part thereof shall be forever barred from prosecution in the Court.

Section 15. When a decision is rendered against a claimant, the Court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

Section 16. Concurrence of two judges is necessary to the decision of any case.

Section 17. Any final determination against the claimant on any claim prosecuted as provided in this Act shall forever bar any further claim in the Court arising out of the rejected **claim.**

Section 18. The Court shall file with its clerk a written opinion in each case upon final disposition thereof. All opinions shall be compiled and published annually by the clerk of the Court.

Section 19. The Attorney General, or his assistants under his direction, shall appear for the defense and protection of the

interests of the State of Illinois in all cases filed in the Court, and may make claim for recoupment by the State.

Section 20. At every regular session of the General Assembly, the clerk of the Court shall transmit to the General Assembly a complete statement of all decisions in favor of claimants rendered by the Court during the preceding two years, stating the amounts thereof, the persons in whose favor they were rendered, and a synopsis of the nature of the claims upon which they were based. At the end of every term of Court, the clerk shall transmit a copy of its decisions to the Governor, to the Attorney General, to the head of the office in which the claim arose, to the State Treasurer, to the Auditor of Public Accounts, and to such other officers as the Court directs.

Section 21. The Court is authorized to impose, by uniform rules, a fee of \$10.00 for the filing of a petition in any case; and to charge and collect for each certified copy of its opinions a fee of twenty-five cents for five pages or less, thirty-five cents for more than five pages and not more than ten pages, forty-five cents for more than ten pages and not more than twenty pages, and fifty cents for more than twenty pages. All fees and charges so collected shall be forthwith paid into the State Treasury.

Section 22. Except as provided in subsection F of Section 8 of this Act, every claim, other than a claim arising out of a contract or a claim arising under subsection C of Section 8 of this Act, cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases. Every claim cognizable by the Court, arising out of a contract and not otherwise sooner barred by law, shall be forever barred from prosecution therein unless it is filed with the clerk of the Court within 5 years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues 5 years from the time the disability ceases. Every claim cognizable by the Court arising under subsection C of Section 8 of this Act shall be forever barred from prosecution therein unless it is filed with

the clerk of the Court within 2 years after the person asserting such claim is discharged from prison, or is granted a pardon by the Governor, whichever occurs later. (As amended by Act approved July 24, 1959.)

Section 22-1. Within **six** months from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any action in the Court of Claims against the State of Illinois for damages on account of any injury to his person shall file in the office of the Attorney General and also in the office of the clerk of the Court of Claims, either by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any. (Added by Act approved July 10, 1957.)

Section 22-2. If the notice provided for by Section 22-1 is not filed as provided in that Section, any such action commenced against the State of Illinois shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further action in the Court of Claims for such personal injury. (Added by Act approved July 10, 1957.)

Section 23. It is the policy of the General Assembly to make no appropriation to pay any claim against the State, cognizable by the Court, unless an award therefor has been made by the Court.

Section 24. "An Act to create the Court of Claims and to prescribe its powers and duties," approved June 25, 1917, as amended, is repealed. All claims pending in the Court of Claims created by the above Act shall be heard and determined by the Court created by this Act in accordance with this Act. All of the records and property of the Court of Claims created by the Act herein repealed shall be turned over as soon as possible to the Court created by this Act.

APPENDIX

AN ACT concerning claims for medical fees or charges for care of escapees from State controlled charitable, penal or reformatory institutions, who are injured while being recaptured. (Approved June 8, 1953. L. 1953, p. 280.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Whenever a claim is filed with the Department of Public Welfare or the Department of Public Safety for payment of medical fees or charges arising from the medical care or hospitalization of an escapee from a State controlled charitable, penal or reformatory institution, who was injured while being recaptured, the Department of Public Welfare or the Department of Public Safety, as the case may be, shall conduct an investigation to determine the cause and nature of the injuries sustained, whether the care or hospitalization rendered was proper under the circumstances and whether the fees or charges claimed are reasonable. The said Department shall forward its findings to the Court of Claims, which shall have the power to hear and determine such claims.

AN ACT terminating the Service Recognition Board, providing for the custody of its records, and providing for the transfer of funds in connection therewith. (Approved May 20, 1953. L. 1953, p. 177. As amended by Act approved May 25, 1955. L. 1955, p. 226.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 3. Any person who had a claim which would have been compensable by the Service Recognition Board except that during the period for filing claims such person was ineligible by reason of a dishonorable discharge from service, who prior to July 1, 1953, has or shall have such discharge reviewed and has obtained or shall obtain an honorable discharge, and any person who had an amended or supplemental claim pending before the Service Recognition Board on May 20, 1953 but had not by that date submitted sufficient evidence upon which the Service Recog-

dition Board could pay the amended or supplemental claim shall be entitled to have such claim considered by the Court of Claims and to have an award on the same basis as if his claim had been fully considered by the Service Recognition Board.

AN ACT concerning damages caused by escaped inmates of charitable, penal, reformatory or other institutions over which the State has control. (Approved June 21, 1935. L. 1935, p. 255. As amended by Act approved June 30, 1953. L. 1953, p. 631.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Whenever a claim is filed with the Department of Public Welfare, or the Department of Public Safety or the Youth Commission for damages resulting from property being stolen, heretofore or hereafter caused by an inmate who has escaped from a charitable, penal, reformatory or other institution over which the State of Illinois has control while he was at liberty after his escape, the Department of Public Welfare or the Department of Public Safety or the Youth Commission, as the case may be, shall conduct an investigation to determine the cause, nature and extent of the damages inflicted, and, if it be found after investigation that the damage was caused by one who had been an inmate of such institution and had escaped, the said Department or Commission may recommend to the Court of Claims that an award be made to the injured party, and the Court of Claims shall have the power to hear and determine such claims.

AN ACT to establish a Military and Naval Code for the State of Illinois and to establish in the Executive Branch of the State Government a principal department which shall be known as the Military and Naval Department, State of Illinois, and to repeal an Act therein named. (Approved July 8, 1957. L. 1957, p. 2141.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 52. Officers, warrant officers or enlisted personnel of the Illinois National Guard or Illinois Naval Militia, who may

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be wounded or disabled in any way, while on duty and lawfully performing the same, so as to prevent their working at their profession, trade or other occupation from which they gain their living, shall be entitled to be treated by an officer of the medical or dental department detailed by The Adjutant General and to draw one-half of their active service pay, as specified in Sections 48 and 49 of this Article, for not to exceed thirty days of such disability, on the certificate of the attending medical or dental officer; if still disabled at the end of thirty days, they shall be entitled to draw pay at the same rate for such period as a board of three medical officers, duly convened by order of the Commander-in-Chief, may determine to be right and just, but not to exceed six months, unless approved by the State Court of Claims.

Section 53. When officers, warrant officers or enlisted personnel of the Illinois National Guard or Illinois Naval Militia are injured, wounded or killed while performing duty in pursuance of orders from the Commander-in-Chief, said personnel or their heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the medical department.

AN ACT to provide for the organization of the Illinois State Guard, and for its government, discipline, maintenance, operation and regulation. (Approved May 18, 1943. L. 1943, vol. 1, p. 1320. Title as amended by Act approved August 2, 1951. L. 1951, p. 1999.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 49. Any officer or enlisted man of the Illinois State Guard who is wounded or sustains an accidental injury or contracts an illness arising out of and in the course of active duty and while lawfully performing the same shall:

(a) Be entitled to necessary hospitalization, nursing service, and to be treated by a medical officer or licensed physician selected by The Adjutant General, and

(b) If prevented from participating in active service or working at his profession, trade, or other occupation from which he earns his livelihood, as the result of disability caused by such injury or illness, during the continuance of such disability be entitled to draw and receive full active duty pay, on the certificate of the attending medical officer or physician, for a period not to exceed thirty days, and, if such disability continues in excess of thirty days, shall be entitled to receive one-half his active duty pay for such period, not to exceed six months, as a board of three medical officers duly convened by The Adjutant General may determine to be just. Provided further, that where the period of such disability exceeds six months the Court of Claims of the State of Illinois shall have jurisdiction to award such further compensation as the merits of the case may demand. Where an officer or enlisted man of the Illinois State Guard is killed in the course of active duty and while lawfully performing the same, or dies as a result of an accidental injury or disease arising out of and in the course of active duty and while lawfully performing the same, or sustains an injury to his property arising out of and in the course of active duty and while lawfully performing the same, he, his heirs or dependents shall have a claim against the State for financial help or assistance and the Court of Claims of the State of Illinois shall act on and adjust the same as the merits of each case may demand. (As amended by Act approved July 13, 1953, L. 1953, p. 1457.)

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(No. 3025—Claimant awarded \$3,264.78.)

ELVA JENNINGS PENWELL, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed October 22, 1958.

JOHN W. PREIHS, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*supplemental* award. Under the authority of *Penwell* vs. Stute, 11 C.C.R. 365, claimant awarded expenses incurred for nursing care, drugs, etc., for the period from October 1, 1957 to July 1, 1958.

TOLSON, C. J.

On September 10, 1958, claimant, Elva Jennings Penwell, filed a supplemental petition for reimbursement for monies expended by her for medical services and expenses from October 1, 1957 to July 1, 1958.

On September 19, 1958, claimant and respondent filed a joint motion for leave to waive the filing of briefs and arguments, and alleged that claimant's receipts for payment of medical bills, and services constituted the entire evidence in the case.

Claimant was injured in an accident while employed at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The accident occurred on February 2, 1936, and the original award is reported in 11 C.C.R. 365. This Court retained jurisdiction of the case, and successive awards have been made from time to time.

The petition before the Court at this time again discloses that claimant is permanently disabled, and is entitled to an additional award.

Original receipts, received in evidence, establish the following claim :

Item A:	Nursing	\$1,031.14
	Room and board for nurses.....	477.75
Item B:	Drugs and supplies.....	280.11
Item C:	Physician	960.00
Item D:	Transportation	107.50
Item E:	Hospital	408.28
	<hr/>	
	Total	\$3,264.78

An award is, therefore, made to claimant for monies expended from October 1, 1957 to July 1, 1958 in the amount of \$3,264.78.

The Court reserves jurisdiction for further determination of claimant's need for additional medical care.

(No. 4766—Claim denied.)

CAROLINE PILS, Claimant, **vs. STATE OF ILLINOIS**, Respondent.

Opinion filed October 22, 1958.

COSTIGAN, WOLLRAB AND YODER, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

JURISDICTION—*no concurrent jurisdiction.* Where claimant has an adequate remedy in a court of general jurisdiction, the Court of Claims is without jurisdiction.

TEACHERS COLLEGE BOARD—status. The Teachers College Board, being a body corporate and politic, may sue and be sued in a court of general jurisdiction.

FEARER, J.

Caroline Pils filed her complaint in this cause on March 12, 1957, and, on April 5, 1957, respondent filed a motion to dismiss the case.

Subsequent thereto, a motion was made to continue this cause until a similar case had been disposed of in the Circuit Court of McLean County. This Court

is now requested to pass upon the original motion to dismiss claimant's complaint.

The motion to dismiss filed by respondent sets forth that the claim is barred as a matter of law for the reason that the Illinois State Normal University is operated, managed, controlled and maintained by the Teachers College Board (Ill. Rev. Stats., 1955, Chap. 122, Par. 577.1); and that said Teachers College Board is a body corporate and politic with the power to sue and be sued (Ill. Rev. Stats., 1955, Chap. 122, Par. 577.7), the legal effect of which defeats the claim alleged in said complaint. (*B & F Hi-Lime Construction Corp. vs. State of Illinois*, 21 C.C.R. 189; *Davern vs. State of Illinois*, 21 C.C.R. 236; *Denton vs. State of Illinois*, No. 4635, opinions filed on October 22, 1954 and January 11, 1955.)

Having had occasion to pass upon the question before, this Court has held that The Board of Trustees of said College is a corporate body with the right to sue and be sued, and that a court of general jurisdiction would be the place to bring such a suit. For said reason, this Court is without jurisdiction.

The present Court of Claims Act, Chap. 37, Sec. 439.8, Par. C, mentions The Board of Trustees of the University of Illinois, but, by omission, eliminates other State Universities. It does not extend to any other corporate entity.

For the reasons heretofore assigned, the motion of respondent to dismiss is allowed, and the claim accordingly dismissed..

(Nos. 4776 and 4781—Consolidated—Claimants awarded \$5,469.63.)

CLARE D. SHULL AND CARTER SHULL, A PARTNERSHIP, D/B/A
SHULL BROS., AND NOI COLEMAN AND EARL COLEMAN,
Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 22, 1958.

R. W. DEFFENBAUGH AND LOVE AND KOST, Attorneys
for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*negligence*. Evidence showed that operator of a National Guard truck was negligent in driving motor vehicle pulling a gun too fast for the condition of the road.

FEARER, J.

The claims of Noi Coleman and Earl Coleman are for personal injuries sustained by Noi Coleman as the result of an accident, which occurred on January 24, 1957, while she was riding as a passenger in the right front seat of a Buick automobile driven by Virginia Shull of Lewistown, Illinois, and owned by Clare D. Shull and Carter Shull, A Partnership, d/b/a Shull Bros., Lewistown, Illinois.

The claim of Shull Bros., A Partnership, is for the total loss of its 1957 Buick automobile. The collision insurance was carried by the Hardware Mutual Insurance Company, and Shull Bros. had a \$50.00 deductible policy. Hardware Mutual Insurance Company was not made a party to the claim filed for property damage to the automobile, but would be entitled to their loss in the event of a recovery by Shull Bros.

There seems to be little dispute as to the facts of the accident, which are borne out by the Departmental Report filed in this case and made a part of the record.

On January 24, 1957, Virginia Shull was driving a

1957 Buick in a northerly direction on State Routes Nos. 78 and 97, three miles north of Havana, Illinois, at about the hour of 3:15 P.M. Noi Coleman was riding as a passenger in the right front seat of said automobile.

Chief Warrant Officer John Albert Mandel was driving a 2½ ton Illinois National Guard truck on said highway in a southerly direction. The Illinois National Guard truck was towing a 40MM AA gun to the Illinois National Guard General Depot in Springfield, Illinois. It was, therefore, being used on an authorized trip for respondent.

The stretch of highway where the accident occurred was rough, and the pavement was slippery. On each side of said highway were ditches from thirty to thirty-five feet deep.

As the two vehicles were approaching one another, the hood on the truck became loose and obstructed the driver's vision. The truck swerved back and forth **across** the center line, and the left rear side of the truck struck the left front of the Buick automobile.

At the moment of impact the Buick automobile was practically stopped, its operator having noticed the swerving of the truck. It was impossible for the Buick automobile to get out of the road of the swerving truck, because of the ditches on the right hand side, being the side upon which the automobile was being driven.

The charges of negligence made are:

1. Excessive speed.
2. Failure to keep the truck, towing the gun, under control.
3. Failure to keep a proper lookout for other vehicles traveling upon the highway.
4. Driving on the left side of the highway.
5. Not yielding one-half of the highway for traffic traveling in the opposite direction.

From the evidence, it appears that, so far as the claimants are concerned, there is no question of contributory negligence, there being very little dispute over the facts. There is no question but what respondent's agent, Chief Warrant Officer John Albert Mandel, was guilty of negligence in the driving and operation of the truck, which was pulling the gun at a speed, which was too fast for the condition of the road at the place where the accident occurred; and that it was the negligent operation of the Illinois National Guard truck, which was the proximate cause of the property damage and personal injuries sustained.

As to the claims of Noi Coleman and Earl Coleman, husband and wife, for out-of-pocket expenses and for personal injuries, it appears from the evidence, and the Commissioner so found, that claimant, Noi Coleman, the passenger in the automobile, received a one inch scar on her right hand, which was not particularly noticeable at the time of the hearing, and a six inch scar on the upper portion of her forehead, which was approximately one-eighth of an inch wide and red in color. The stitches taken in her forehead were visible at the time of the hearing.

Noi Coleman also testified that she received scars, which were concealed by her hair. The Commissioner in his report states that he did not view the scars, which were covered by her hair.

Noi Coleman was confined to the Graham Hospital in Canton, Illinois for approximately one week. She incurred the following expenses : Hospital charges, \$187.94 ; doctor bill, \$100.00; drugs, \$7.83; ambulance service, \$20.00; and nurses fees, \$35.00.

She also claims damages to her clothing and personal effects as follows: Coat, \$65.00; slip, \$5.00; glasses, \$18.00; pocket book, \$12.00; blouse and skirt, \$10.00.

At the time of the accident Noi Coleman and Earl Coleman operated the Spoon River Hotel in Lewistown, Illinois. Mrs. Coleman acted as a part time day clerk. In addition thereto, she performed domestic services. They also made their home in the hotel, and, as a result of the injuries of Noi Coleman, it was necessary to hire domestic help in their home, as well as in the hotel. Mrs. Coleman testified that she was off work from January 24, 1957 to September 18, 1957, and that during such period of time Mr. Coleman hired outside help for the home and hotel at the rate of \$25.00 per week. From September 18, 1957 to December 15, 1957 extra help was hired for \$20.85 a week. During this period of time a Mrs. Bennett was also hired for miscellaneous work and as a part time day clerk at the rate of \$27.00.

Noi Coleman further testified that she has been nervous since the accident, and that the scars had made her self-conscious. However, at the time of the hearing she stated that they no longer bothered her. She further testified that her knees bothered her, but that there was no permanent injury to them, and that the only permanent injury claimed was for the scars.

In case No. 4781, Noi Coleman and Earl Coleman, it appears that the total special damages proven is in the amount of \$1,581.82.

In case No. 4776, Clase D. Shull and Carter Shull, A Partnership, d/b/a Shull Bros., a representative of the Hardware Mutual Insurance Company testified that the automobile of Shull Bros. was a total loss. The cost of

replacement was \$3,616.63. The salvage recovered was in the amount of \$1,201.00.

It appears that the Hardware Mutual Insurance Company also paid for the towing and storage of the automobile, which amounted to \$54.00. The collision insurance carried by the Shull Bros. was a \$50.00 deductible policy. The net loss, including towing and storage, is, therefore, \$2,469.63, of which amount Clare D. Shull and Carter Shull, A Partnership, d/b/a Shull Bros., have a deductible interest in the sum of \$50.00.

It is, therefore, the order of this Court that awards in the consolidated cases be made as follows:

To Earl Coleman and Noi Coleman, claimants in case No. 4781, the sum of \$3,000.00 for personal injuries.

To Hardware Mutual Insurance Company, the insurance carrier for claimants in case No. 4776, Clare D. Shull and Carter Shull, A Partnership, d/b/a Shull Bros., the sum of \$2,419.63.

To Clare D. Shull and Carter Shull, A Partnership, d/b/a Shull Bros., claimants in case No. 4776, the amount of \$50.00.

(No. 4810—Claim denied.)

MARVIN KING, D/B/A KING'S TAVERN, Claimant, **vs.**
STATE OF ILLINOIS, Respondent.

Opinion filed October 22, 1958.

MCROBERTS AND HOBAN, Attorneys for Claimant.
LATHAM CASTLE, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*damages from temporary interference with access to property.* Inconvenience, expense, or loss of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent interference with the right of access to property, made necessary by the construc-

tion of a public improvement, gives no cause of action against the **State or a municipality** making the public improvement.

FEARER, J.

On February 7, 1958, claimant filed his complaint, in which he seeks damages for inconvenience and loss of business during the construction of a public improvement, This was allegedly caused by the widening, repairing and reconstruction of Illinois State Route No. 3 in front of his tavern, which is located at 300 South Water Street, Cahokia, Illinois. The complaint also alleges the entrances and exits to his said tavern were blocked for a period from September 5, 1957 until January 1, 1958. Claimant asks damages in the sum of \$1,900.00.

On July 8, 1958, respondent filed a motion to strike and dismiss the complaint for legal insufficiency. Claimant did not file objections to respondent's motion to strike and dismiss.

Claimant sets forth the following allegations in his complaint :

That on or about September 5, 1957, and prior and subsequent thereto, Marvin King, claimant, was the duly licensed owner, manager and operator of a certain tavern, known as "King's Tavern", located at 300 South Water Street, being Illinois State Route No. 3, Cahokia, Illinois.

That claimant, prior to September 5, 1957, had an average income from the operation of said tavern of \$50.00 per day, and the volume of business was increasing.

That respondent did contract with Fruin-Colnon Contracting Company to widen, repair and reconstruct certain sections of Illinois State Route No. 3. That said contracting firm did widen and reconstruct said State

Route No. 3 at a point directly in front of said tavern, and, in doing so, did block all of the entrances and exits to and from said tavern for a period from September 5, 1957 until January 1, 1958.

That, due to the widening and reconstruction, ingress and egress to claimant's property was blocked, and his customers did not have access to the tavern.

That he was forced to close the tavern from September 5, 1957 until January 1, 1958, a total of 118 days, at a loss of \$50.00 per day, or a total damage of \$1,900.00, for which he is now making claim.

This Court recently had occasion to pass upon a similar motion to strike a complaint seeking damages for the same reason, being the case of *Joseph O. Engebretson vs. State of Illinois*, No. 4759.

Previous to this last decision, the case of *Grothe vs. State of Illinois*, 10 C.C.R. 49, was decided by the Court of Claims. This Court held in that case:

"The question here involved has been considered by this Court in a number of cases. In the case of *Grassle vs. State of Illinois*, 8 C.C.R. 151, we held that: 'Inconvenience, expense, or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement do not constitute damage to property not taken within the meaning of the Constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made, and, therefore, give no cause of action against a municipality therefor.' "

This Court also had occasion to pass upon the same question in the case of *Edward vs. State of Illinois*, 10 C.C.R. 671. At page 673, the opinion reads as follows:

"In the case of *Chicago Flour Company vs. City of Chicago*, 243 Ill. 268, plaintiff sued the city to recover damages, which it sustained as the result of being deprived of the use of a certain switch track during a construction period. The Supreme Court in considering the matter said: 'The only invasion of their rights complained of is the temporary interference with the ordinary means of access to and egress from their property during the progress of the work. It is well settled that inconvenience, expense or loss

of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent interference with their right of access to their property, made necessary by the construction of a public improvement, gives no cause of action against the municipality. The Constitution provides no remedy for the property owner under such circumstances. Such claim is not damage to property not taken within the meaning of the Constitution.' "

Numerous other cases have been cited wherein motions have been sustained to strike and dismiss claims predicated upon similar circumstances, where public works were being performed on highways in front of private businesses blocking the access thereto, and thereby resulting in losses to the owners and operators of said businesses.

It is the opinion of the Court that the complaint filed herein is insufficient, and does not state a good cause of action. Therefore, the motion of the respondent is allowed, and the complaint is hereby dismissed.

(No. 4817—Claimant awarded \$989.00.)

THE COUNTY OF **WILL**, Claimant, vs. STATE OF ILLINOIS,
Respondent.

opinion filed October 22, 1958.

FRANK H. MASTERS, JR., Attorney for Claimant.

LATHAM CASTLE, Attorney General; SAMUEL J. DOY,
Assistant Attorney General, for Respondent.

COUNTIES—*reimbursement* for writs of habeas corpus in *forma pauperis*. Upon stipulation of facts and expenses, an award was entered pursuant to Ill. Rev. Stats., 1957, Chap. 65, Secs. 37-39; and Chap. 37, Sec. 439.8.

FEARER, J.

A claim on behalf of The County of Will of the State of Illinois was filed by Meade Baltz, Chairman of the Board of Supervisors of said County, by and through Frank H. Masters, Jr., State's Attorney of said Will

County, seeking to recover from respondent the sum of \$989.00.

The record consists of the following :

1. Complaint.
2. Stipulation.
3. Joint motion of claimant and respondent for leave to waive the filing of briefs and oral argument.
4. Order of the Chief Justice granting the joint motion of claimant and respondent for leave to waive the filing of briefs and oral argument, and further ordering the case taken under advisement on the present record.

The action is predicated on specific statutes, which confer jurisdiction on the Court of Claims to hear cases brought thereunder. (Ill. Rev. Stats., Chap. 65, Sees. 37, 38 and 39; Chap. 37, Sec. 439.8.) The statutes referred to herein provide for reimbursing certain counties in Illinois for expenses, costs and fees incurred because of petitions for writs of habeas corpus in forma pauperis filed therein. The petitioners are non-residents of the county in which the petitions were filed.

This Court has had occasion to pass upon similar cases. (*The County of Randolph vs. State of Illinois*, 21 C.C.R. 427, and *The County of Will vs. State of Illinois*, 18 C.C.R. 189.)

A stipulation of the facts was entered into and filed herein, as follows :

"It is hereby stipulated and agreed by and between the parties through their respective attorneys, as follows:

1. That The County of Will of the State of Illinois has situated within its borders the Illinois State Penitentiary, a penal institution of the State of Illinois.

2. That the petitions for writs of habeas corpus, set forth in claimant's complaint as exhibit A, have been filed in the office of the Clerk of the Circuit Court of Will County, Illinois.

3. That said petitions were filed by inmates of the Illinois State Penitentiary, who were not residents of The County of Will of the State of Illinois at the time of their commitment, and were not committed by any court of The County of Will.

4. That Sec. 31, Chap. 53, Ill. **Rev.** Stats., provides that the fee of the Clerk of the Circuit Court shall be \$10.00 as to each petition for a writ of habeas corpus filed with such Clerk.

5. That Secs. 37, 38 and 39, Chap. 65, Ill. **Rev.** Stats., provide that the State of Illinois shall assume and pay to each county the necessary expenses incurred by it and its officers, either by means of services rendered or otherwise by reason of court proceedings in such counties involving petitions for writs of habeas corpus by such inmates as above mentioned.

6. That, in addition to the services of the Clerk of the Circuit Court rendered in said matters, there were also incurred expenses for preparing and furnishing the petitions of such matters, photostatic copies of court records and documents as set forth in claimant's exhibit A of the complaint heretofore filed.

7. That the claim of The County of Will against the State of Illinois for its necessary expenses is in the sum of \$989.00.

8. That this claim has never been presented to any State department or officer, or to any person, corporation or tribunal.

9. That no assignment or transfer of this claim, or any part thereof, or interest therein has been made."

The Clerk of the Circuit Court of Will County is entitled to receive \$10.00 for each petition filed, or the sum of \$950.00. (Chap. 53, Sec. 31, Ill. Rev. Stats.)

In addition thereto, The County of Will has expended \$39.00 for copies of petitions furnished to the Attorney General and expenses in connection therewith, all in accordance with exhibit A attached to the complaint filed herein.

Claims of this kind have been passed upon by the Court of Claims before, and all have been in conformity with the statutes of the State of Illinois, as hereinabove stated.

An award is, therefore, entered herein in favor of The County of Will in the sum of \$989.00.

(No. 4689—Claim denied.)

HAROLD E. MOE, Claimant, **vs. STATE OF ILLINOIS**, Respondent

Opinion filed November 11, 1958.

KILROY, KENT AND LITOW, Attorneys for Claimant

SAMUEL J. DOY, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—personal injuries. Claimant failed to sustain burden of proof that he was free from contributory negligence when cleaning the rollers on a soap grinding machine with a brush while it was in operation.

SAME—contributory negligence. Claimant's statement that he was never instructed not to clean the grinding machine, while it was in operation, **does** not sustain the burden of proving himself free from contributory negligence.

TOLSON, C. J.

On September 8, 1955, claimant, Harold E. Moe, a prisoner at the Illinois State Penitentiary, Joliet, Illinois, filed his complaint seeking damages for injuries received on November 26, 1954.

The facts of the case are as follows :

Claimant sought work for which he would be paid some wages, and was assigned to the soap factory. Mr. Alex Barr, superintendent of the plant, introduced him to Duke Luntz, one of the prison foremen, or "gaffers", as they were called, who in turn assigned the jobs, and gave such instructions as were needed in the operation of the factory.

Claimant worked in the factory from June of 1952 to November 26, 1954, the time of the accident. He developed into such a good worker that, at the time of the accident, he had worked up to the position of a "gaffer".

On the date in question, claimant was cleaning the rollers of a soap grinding machine with a wire brush while the rollers were still turning. In some manner his right hand was caught in the steel rollers, and claimant suffered severe crushing injuries to the right elbow, fore-

arm, hand and fingers. As a result, there is severe limitation of motion of the elbow and fingers, and there can be no doubt but that claimant suffered great pain, and will have permanent injuries.

Claimant alleges in brief:

- (1) Respondent installed an unsafe machine.
- (2) Respondent required claimant to work on an unsafe machine.
- (3) Respondent failed to properly instruct claimant in the operation of the machine.
- (4) Respondent failed to provide a control switch at or near the machine.
- (5) Respondent negligently instructed claimant to clean the rollers of the machine while it was in operation.

Respondent, by failing to answer, has traversed the claim, and argues that claimant was guilty of contributory negligence.

Prom the evidence introduced in said cause, this Court is presented with three questions of fact:

- 1. Was respondent guilty of negligence in failing to properly instruct and supervise workers in the operation of the soap factory?
- 2. Should the machine have been equipped with a cut-off switch on or near the machine?
- 3. Was claimant guilty of contributory negligence?

This Court is not unmindful of the serious and permanent injuries suffered by claimant, nor can the Court ignore the fact that the soap factory did not have the best of supervision. However, the evidence of contributory negligence is so strong that an award cannot be made in any event.

Claimant cites the case of *Moore vs. State of Illinois*, 21 C.C.R. 282, wherein an award was made, to a convict, who was injured while using a food grinder.

"Claimant, as a convict, was required to take orders, and carry them out. To refuse to do so would subject him to disciplinary action, and the forfeiture of his limited privileges, including prompt consideration for parole. Thus, he did not occupy a position of independence, which a person outside a penitentiary occupies. His choice of action being limited, he, therefore, kept

silent, and did as he was ordered. In fact, he did not possess, under the circumstances in this case, the freedom of choice inherent in the doctrines of assumed **risk** and contributory negligence. We do not, however, hold that such doctrines can never be asserted against a convict, but merely conclude that they do not apply in this case."

We do not have the benefit of the transcript of evidence of the Moore case before us, but it would appear that claimant was ordered to operate the food grinder without the benefit of a hopper for protection, and suffered the injury in question. The Court believed, under the evidence in the case, that the convict had no choice but to obey, under penalty for refusal.

The facts in case are in no way similar. Claimant was not a new inexperienced hand in the soap factory. He had worked there for two years, and on the basis of his experience he had worked himself up to the position of a "gaffer".

It does not appear from the evidence that the soap grinder was a dangerous instrumentality per se, nor was claimant ordered to operate the machine in question (abstract, page 10), as was required in the Moore Case (*supra*), but he did so as a part of his routine job.

Claimant has also urged that he was obliged to meet a quota—the implication being that he was being rushed, and probably could not do his work in a safe orderly manner. The evidence does not support this implication for it appears that the soap factory operated five days a week, while the soap grinder was only put into operation two days a week for a two hour period.

Our courts, at all times, have held that a plaintiff has the burden of proof in showing that he was free from contributory negligence. This rule of law is so well settled that cases need not be cited.

To sustain this burden, claimant testified as follows:

"I worked on the soap grinding machine for about a year before the accident, and was never instructed not to clean the machine when it was running."

The statement that he was never told *NOT* to clean the rollers, while they were in motion, falls short of establishing freedom from contributory negligence.

In the case of *Allen vs. State of Illinois*, 21 C.C.R. 450, this Court denied the claim of a convict, who was injured while working in a prison, on the grounds that he had failed to sustain the burden of proof required of him in proving that he was free from contributory negligence.

Our Illinois Courts have held that a person cannot knowingly expose himself to danger, and then recover for an injury sustained, when it could have been avoided by the use of due care. *Ames vs. Terminal Rail Association*, 75 N.E. (2d) 45.

The proximate cause of this injury was claimant's failure to use ordinary care on his own behalf, and an award will, therefore, be denied.

(No. 4799—Claimant awarded \$9,872.41.)

M. J. HOLLERAN, INC., Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed November 11, 1958.

GORDON B. NASH, Attorney for Claimant.

LATHAM CASTLE, Attorney General; LESTER SLOT, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriations. Where evidence showed that, at the time a deviation from the contract was required and additional work performed, there were sufficient unexpended funds on hand to pay the claim, an award will be made.

FEARER, J.

M. J. Holleran, Inc., by Gordon Nash, its attorney, filed a complaint in this Court against respondent on December 23, 1957. No answer was filed by respondent, and it is, therefore, being considered that a general traverse of the allegations set forth in the complaint is made by respondent under the rules of this Court.

The record consists of:

1. Departmental Report.
2. Stipulation of facts.
3. Commissioner's Report.

This case was referred to Commissioner Immenhausen, who filed his report herein on October 16, 1958.

The present claim is an outgrowth of a contract entered into with respondent, Department of Public Works and Buildings on February 8, 1954 for certain heating installations, and for rehabilitation of the heating system in various buildings at the Alton State Hospital, Alton, Illinois, contract No. 68144, (exhibit A).

It appears from the record that claimant was required to deviate from the original contract and drawings during the course of the contract. It further appears that, on April 11, 1955, a letter was written by an agent of claimant to the Division of Architecture and Engineering of the Department of Public Works and Buildings advising said Department of the necessity for such deviation.

Claimant performed its services, and supplied material in accordance with the original contract. It subsequently furnished drawings, and an itemization of material and labor necessary for the additional work it had to do, which was a deviation from the original contract. All of the services performed were done in a satisfactory manner, (exhibit B).

Subsequent to the completion of the extra work, i.e., August 10, 1956, a letter was written by claimant to the Department discussing the itemization on the breakdown for additional work and costs for material and labor in the total sum of \$9,782.41, (exhibit C).

In response, on April 10, 1957, a letter was written by Otto L. Bettag to E. A. Rosenstone, Director of the Department of Public Works and Buildings, advising the Director that the Division of Architecture and Engineering had made inspections of the additional work and recommended the bills for payment.

The reason that the bills could not be paid was because of the lapse of the appropriation for the 68th Biennium. It appears that there was a sufficient sum of money remaining on hand at the time the appropriation lapsed to pay this claim in full.

There appears to be no question but that the work was performed in a satisfactory manner, and that the charges made therefor were fair and reasonable.

The basis for the claim, the reasonableness of the claim, and the recommendation of payment are borne out by a stipulation entered into between claimant, by its attorney, and respondent, by the Attorney General, at the time of the hearing before Commissioner Immenhausen on June 11, 1958.

Said stipulation, in substance, is as follows :

1. The stipulation refers to contract No. 68144, a photostatic copy of which is attached thereto as exhibit No. 1-A.
2. Claimant found it necessary to deviate from the original contract and drawings On April 11, 1955, M. J. Holleran, Inc., by Francis J. Conry, one of its employees, wrote to the Division of Architecture and Engineering, advising of the necessity for deviating from the original contract A copy of the letter, dated April 11, 1955, was attached and marked exhibit No. 2-A.
3. The undated letter attached to the stipulation, marked exhibit B, was written by claimant notifying the Division of Architecture

and Engineering of the description of the additional work required because of the deviation from the contract.

4. On January 19, 1956, the Department of Public Works and Buildings, Division of Architecture and Engineering, advised claimant of the receipt of the undated letter, and requested a breakdown form of the extras. A true photostatic copy of said reply is attached and marked exhibit C.
5. On August 30, 1956, in reply to the letter of the Division of Architecture and Engineering of January 19, 1956, claimant forwarded to the Department of Public Works and Buildings, Department of Architecture and Engineering, an itemized breakdown of the cost of the additional work required by the deviation from the original contract, including labor and materials. A true photostatic copy of the statement is attached to the stipulation and marked exhibit D.
6. The total cost of the additional work, as disclosed by exhibit D, was \$9,872.41.
7. Prior to April 10, 1957, respondent, through its Department of Public Works and Buildings, Division of Architecture and Engineering, presented to the Director of Public Welfare the claim for payment for additional work in the amount of \$9,872.41 recommending favorable consideration be given it.
8. A letter was written on April 10, 1957 to the Director of the Department of Public Works and Buildings by Dr. Otto L. Bettag, Director of the Department of Public Welfare, which advised the Department of Public Works and Buildings of the action of the Division of Architecture and Engineering. It stated, however, that, due to the lapse of the appropriation for the 68th Biennium, funds to pay the claim were no longer available. A copy of this letter is attached to the stipulation and marked exhibit E.
9. Claimant is the owner of the claim in the total amount of \$9,872.41, and is the only party interested therein.
10. No assignment or transfer of the claim or any interest therein has been made by claimant.
11. The fair and reasonable value, after allowing all just credits and setoffs for the labor and material furnished by claimant to complete the contract of February 15, 1954, was \$9,872.41.

The Commissioner reported that he examined the exhibits and stipulation, and found them to be true and correct. He has recommended the allowance of the claim, as filed, in the amount of \$9,872.41.

This Court has had occasion to pass on several matters of a similar nature, and in these previous cases we have held that an award would be made where sufficient

funds were available in the appropriation to pay the claim had it been received in apt time. Funds were available in the present case at the time the services were performed. The materials were furnished, and the work was satisfactorily performed and accepted by respondent. The only reason for the claim not being paid was the lapse of the appropriation from which it could have been paid.

An award is hereby made to M. J. Holleran, Inc., in the amount of \$9,872.41.

(No. 4725 — Claimant awarded \$3,425.28.)

RAY FRANKLIN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion *filed March 26, 1959.*

O'BRIEN, BURNELL AND PUCKETT, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; SAMUEL J. DOY, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligent spraying of right of way.* Evidence sustained finding that respondent was negligent in spraying 2,4-D on a windy day adjacent to claimant's tomato field, which immediately thereafter showed 2,4-D damage.

DAMAGES—*valuation of growing crop.* The value of a growing crop must be arrived at from a consideration of numerous factors including the condition and quality of the soil, nature of the crop, its probable yield, hazard of maturity, kind of crop the land will ordinarily yield, and the expenses which would ordinarily be incurred in transporting the crop to market.

SAME—*evidence of subsequent damages.* It was proper to deduct from the estimated yield of a tomato crop, damaged by spraying, the loss paid by an insurance company for damages occasioned by a hail storm subsequent to the spraying.

WHAM, J.

This is a claim for \$7,500.00 brought by claimant, Ray Franklin, to recover from respondent, the State of Illinois, the amount of money damages sustained by him,

which proximately resulted from the negligent spraying of a weed killing chemical, known as 2,4-D, by and at the direction of the State of Illinois, Division of Highways, along State highway No. 126 adjacent to the tomato field of claimant near Yorkville, Illinois, on the 14th day of June, 1955, resulting in damage to the tomato crop of claimant.

There is little material dispute as to the facts concerning the spraying activities, but there exists a fundamental dispute as to the application of the law to the facts, and the amount of damages proven.

In April of 1955 the State of Illinois engaged one Charles D. McFarland, d/b/a McFarland's Tree Service, to spray weeds along the State highways. On June 14, 1955, Mr. McFarland's spray rig was operating along Route No. 126, between Yorkville and Plainfield, Illinois, at a point adjacent to the tomato field of claimant. The spray concentrate furnished by the State of Illinois to Mr. McFarland was a low volatile 2,4-D ester type mixed with water, and was sprayed at 50 pounds pressure at a height of approximately two feet above the ground. No part of claimant's tomatoes were directly sprayed, nor did the spray in its initial application carry across the fence into the tomato field.

On this day of June 14th the tomato plants were in the stage of first bloom, were stocky with large main stems and excellent vine growth. Following the spraying, the entire tomato acreage appeared to be uniformly damaged. On June 15th the plants were drawn up, the foliage was severely distorted, and the vines gave the appearance of constriction of growth. The plants on inspection had all the characteristics of 2,4-D damage.

Claimant's witness, Wayne Robbins, pathologist and

geneticist for the Campbell Soup Company, testified that the 2,4-D spray material would volatilize at 90° temperatures for at least a week subsequent to the spraying. The toxic ingredients would then drift with the wind as a vapor, and be as effective as if sprayed directly upon the vines. This witness testified that he inspected the field three days after the occurrence of the spraying incident, and gave his opinion that there had been a strong application of 2,4-D to the tomato plants, and that it could have been caused by spraying adjacent to the field, which volatilized, and was carried over the field by the wind. This witness qualified as, and was conceded by respondent to be an expert in his field. Respondent also conceded that 2,4-D is generally injurious to tomato plants.

It is respondent's position, however, that these facts fail to establish negligence on the part of respondent, inasmuch as there was no direct spraying of claimant's field, nor do the facts establish that respondent should have foreseen that the spray would volatilize, and later drift upon the land of claimant. Respondent points out that there was no evidence offered as to the temperature at the time of the spraying or any time thereafter, and that, therefore, claimant has failed to offer sufficient evidence to establish that the 2,4-D volatilized in the manner stated by Mr. Robbins, or that respondent should have foreseen such a result.

Respondent correctly states that the burden is on claimant to prove his case, but we feel that, in determining whether or not the burden has been discharged, we cannot close our eyes to the circumstances, probabilities, and legitimate inferences, which arise from the facts proven by the evidence.

The evidence clearly establishes that the crop was uniformly damaged by a strong 2,4-D solution, and such damage manifested itself the day following the spraying operations. Mr. Franklin, claimant, testified that he had not sprayed his field, and that none of his neighbors had sprayed after his tomato plants had been planted.

The evidence to the effect that the spraying was conducted in the middle of June on a windy day, when taken in connection with the other evidence heretofore narrated, seems sufficient to us to establish a causal connection between the spraying by the State and the damage to the plants of claimant, even in the absence of testimony pertaining to the exact temperature of the day.

As to the question of negligence, we believe that the State should have known of the volatile nature of this spray, and the probable results of its use, if in fact they did not know, by conducting an investigation, inquiry and tests before using it in the vicinity of a tomato field. If inquiry had been made, the information known by claimant's witness Robbins would have been known by respondent prior to the occurrence in question.

It was conceded that the State knew of the spray's damaging qualities when applied to tomato plants. The State, therefore, owed a duty to claimant to refrain from spraying along the road when it was reasonably foreseeable that the spray would revolatize and drift onto claimant's field. Consequently, we feel that claimant has borne the burden of proof on the question of negligence and proximate cause.

It goes without saying that the question of due care on the part of claimant is not a problem. The evidence sufficiently establishes that he was in the exercise thereof at and prior to the occurrence in question.

As to the extent of the damages, we must also utilize inferences that arise from the basic facts in order to come to a conclusion on the amount. Admittedly, this type of cases presents considerable difficulty in arriving at a precise amount of damage, since seldom, if ever, is there definite proof on this question.

Claimant and the Campbell Soup Company had entered into a contract covering the 1955 crop, wherein claimant agreed to sell, and the Campbell Soup Company agreed to purchase the entire crop at a price of \$35.00 per ton for Grade No. 1 tomatoes and \$23.00 per ton for Grade No. 2 tomatoes.

The estimated yield of claimant's 1955 crop on June 14th, as testified to by claimant's witnesses, was 16 to 17 tons per acre. The evidence with respect to the number of acres planted varied from 54.3 acres to 61 acres. The burden being on claimant, and there being no more reason for accepting one set of figures than the other, we find that the estimated yield was 16 tons per acre, and the acreage planted was 54.3 acres, and, therefore, the total estimated yield was 868.8 tons.

The evidence established that claimant's field produced 71% Grade No. 1 and 27% Grade No. 2 tomatoes for an average of \$30.08 per ton. Claimant contends that the average crop in the area was slightly higher for grade No. 1, but the evidence does not establish any basis upon which to find that the spray damage caused claimant's crop to have a lesser percentage of grade No. 1 tomatoes. Therefore, we find that the average contract price for claimant's tomatoes was \$30.85 per ton.

The evidence established that the harvesting and marketing expense, including hamper rental, trucking tomatoes to Chicago, and picking the tomatoes was

\$12.68 per ton, thus leaving a net loss basis per ton on unmarketed tomatoes at \$18.17.

Claimant contends that the number of tons lost by reason of the spray damage was seven tons per acre. This he arrives at from the testimony of his witnesses, Wayne Robbins, who estimated the loss at the time of his inspection of the tomato field on June 17th, three days after the spraying, and Sylvester P. Browning, crop supervisor for the Campbell Soup Company, who inspected the field as late as July 16th.

From claimant's evidence it appears that the type of damage, which a spraying of the plants causes, is delay in maturity, restriction in growth, and, as claimant stated, "The field just stands still after a shock like that. They don't *go* ahead with its natural growing and all. It stands for a while."

The most satisfactory proof of this damage would have been to take the difference of the expected yield and the actual yield, which in this case was established as 5.6 tons per acre, or a total of 304.08 tons.

Unfortunately, however, a severe hail storm occurred on July 23, 1955 after the spraying damage occurred. This complicates the situation, and prevents arriving at the loss in this manner.

However, the hail damage can be gauged to a fair degree of accuracy in view of the fact that an insurance appraisal forming the basis for a \$6,837.00 adjustment was made on the loss occasioned by the hail. Converting this figure into tons per acre at \$18.17 per acre reflects a hail loss of 376.207 tons.

Obviously this loss could not be attributed to spray damage, and a total of the tons harvested plus the tons lost by reason of the hail damage would be a fair ap-

proximation of the total yield after the spray damage occurred. This amounts to 680.287 tons. The difference between this figure and 868.8 tons, which was the estimated yield at 16 tons per acre prior to the hail damage, leaves a total of 188.513 tons lost by reason of spray damage. Converting this figure into dollars at \$18.17 per ton equals \$3,425.28 total damages.

This appears to us to be a far more accurate method of arriving at the amount of damages resulting from the spraying of the tomatoes than the method urged by claimant. It also is more accurate in our judgment than by comparison of ultimate yield with other fields in the area, inasmuch as there would be no way to compare the extent of hail damage on two tracts of land though located in the same general vicinity.

Claimant contends that; the hail damage of July 23, 1955 should not be considered in arriving at the damage to the crops, since it occurred subsequent to the spray damage.

In our judgment, as we have heretofore stated, it is proper to refer to the hail loss in the process of ascertaining the value of the crop immediately following the spray damage, and the value of same at the marketing season. This seems to us to be in accordance with the rule announced in *Scanlan vs. Musgrove*, 91 Ill. App. 184 at 186, relied on by claimant, which rule is stated by the court in discussing the value of damaged, immature crops, as follows:

“and this value may be properly ascertained by showing the probable amount of wheat the crop, as it appeared when destroyed, would likely yield; the value of the same at the market season, and deducting therefrom the necessary cost for harvesting and threshing the same.”

As the rule is stated in *Illinois Law and Practice*, Vol. 15, Sec. 43, Damages, at page 537:

"The true value of a growing crop must be arrived at from a consideration of numerous facts, including the condition and quality of the soil, the nature of the crop, its probable yield, the hazard of maturity, the kind of crops the land will ordinarily yield, and the expense, which would have been incurred after the injury in transporting the crop to market."

It seems clear to us that the hazard of maturity could be no more accurately established than by the evidence in this case concerning the appraised damages resulting from the hail loss by the same insurance company charged with paying for that loss.

Moreover, the obvious result of ignoring the hail loss would be to compensate claimant by the State for damages not caused by the State. This we will not approve.

The claim should be allowed not in the sum of \$7,500.00 as claimed, but in the lesser sum of **\$3,425.28**, which we feel the evidence has fairly established as the amount of damage caused by the negligent spraying operation conducted by the State of Illinois. The claim is, therefore, allowed in the amount of \$3,425.28.

(No. 4730—Claimants awarded \$26,829.00.)

LEON DUNHAM, LEON BROWN, FREDDIE LEWIS, WILLIE BRITTON, JR., BURTON MOSLEY, WILLIE L. WALKER, KATIE AARON, FOR HERSELF AND AS NEXT FRIEND FOR LINEL AARON, A MINOR, LESTER AARON, A MINOR, LORETTA AARON, A MINOR, LARRY AARON, A MINOR, THE HEIRS AND DEPENDENTS OF LESTER AARON, DECEASED, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 26, 1959.

MOORE, MING, LEIGHTON AND CHAUNCEY ESKRIDGE,
Attorneys for Claimants.

LATHAM CASTLE, Attorney General; LESTER SLOTT,
Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—injuries to members. Where national guardsmen were injured, while under orders from their Commander-in-Chief, they are entitled to awards.

SAME—effect of federal payments as compensation for same injuries.

Federal payments do not bar recovery under the Military and Naval Code, but such payments will be taken into consideration by the Court in arriving at amount of awards.

WHAM, J.

This case involves multiple claims for recovery under Article XVI, Section 11 of the Military and Naval Code of Illinois, Ill. Rev. Stats., (1953 State Bar Association Edition), Chap. 129, Par. 143.

Claimants, Leon Dunham, Leon Brown, Freddie Lewis, Willie Britton, Jr., Burton Mosley, Willie L. Walker, and Lester Aaron, deceased, were enlisted men and members of the 178th Regimental Combat Team, Illinois National Guard, assigned for and performing their duties as drivers or relief drivers on a motor convoy of approximately one hundred vehicles returning from their annual summer field training period at Camp Ripley, Minnesota.

Claimants Brown, Walker, and the deceased, Lester Aaron, were each driving trucks, while claimants, Lewis, Britton and Mosley were relief drivers riding in the trucks.

The convoy departed on July 22, 1954 from Camp Ripley, Minnesota for its home station in Chicago, Illinois. On July 23rd, after spending the night at Camp McCoy, Wisconsin, the convoy proceeded toward Chicago on U. S. Route No. 12. At a point approximately seven miles south of Baraboo, Wisconsin, in dark rainy weather, and on a blacktop highway, the convoy, after negotiating a long incline and a curve at the crest, started downhill. A civilian automobile, passing the convoy on the left, suddenly cut into one of the intervals between the vehicles directly in front of the deceased, Lester Aaron, who immediately applied his brakes. His truck slid out of control, turned over, and resulted in injuries

from which he died. Claimants, Willie Britton, Jr., and Burton Mosley were riding in the truck driven by Lester Aaron, and were also injured when the vehicle overturned.

Claimant, Willie Walker, was driving a truck following that driven by Aaron. Upon arriving at the crest of the hill he saw the overturned truck in front of him, and applied his brakes, which caused the truck to overturn, and resulted in injuries to him and to claimant, Leon Dunham, who was riding in the truck.

Claimant, Leon Brown, was the driver of a third truck. Upon arriving at the crest of the hill, he applied his brakes upon seeing the other trucks overturned, which caused his truck to slide off the road, and come to rest on its side, and resulted in injuries to his person.

Claimant, Freddie Lewis, a relief driver in still another truck, which was being driven by Private First Class Luckie A. Wright, was injured when that truck likewise slid off the road, and turned over on its right side, when its driver attempted to come to a stop upon arriving at the scene of the accident.

All of the men involved in the accident were found to be in the line of duty, and were injured or killed while performing their duties as enlisted men in pursuance of orders from their Commander-in-Chief. The occurrence was not a result of wilful neglect or misconduct on the part of claimants. There is no dispute on this point, and admittedly they come within the provisions of the above statute.

In considering the amount of financial help and assistance each claimant is entitled to under the statute, we must consider each separately, and attempt to adjust the same as the merits of each demand.

With respect to claimant, Master Sergeant Leon Dunham, the evidence established that he was 25 years of age, married, and the father of two children. He was employed by the Ford Motor Company, Aircraft Engine Division, as a jet engine mechanic at \$2.19 per hour. He was hospitalized from July 23, 1954 through December, 1954, and the injuries he sustained consisted of total blindness of the left eye, and a 10% loss of hearing of the left ear. He also sustained a basilar skull fracture. He appeared before the Physical Evaluation Board at the Walter Reed Army Hospital on November 23, 1954, and his injuries were found to be permanent. After being released from the hospital, he returned to work at the Ford Aircraft Engine Division as a janitor at \$1.74 per hour. On the date of the hearing he was employed at Hallicrafter Radio Engineering at \$2.00 per hour, and worked forty hours per week. Claimant testified that he was found by the Evaluation Board to have a 40% disability, and receives \$263.00 per month on a 60% disability rating from the Veterans Administration, which he chose rather than retirement benefits from the Army, due to the higher evaluation.

Claimant stated that he lost a total sum of \$5,748.00 in wages due to the injuries, but drew \$3,400.00 in military pay during that time. He also stated that he received \$1,140.00 as a dependence allowance for his wife and children during that period. This claimant also received \$41.00 per week for twenty-six weeks, totaling \$1,066.00, as well as the sum of \$1,000.00 for the loss of the sight of one eye from the John Hancock Insurance Company, which was a group policy, the benefits of which he was entitled to because of his employment with the Ford Motor Company.

In determining the amount claimant is entitled to under the Military and Naval Code of the State of Illinois, it has been the policy of this Court to take into consideration the amount received from the Federal Government as compensation for the same injuries, although such payments under the federal laws pertaining to members of the Armed Forces, including national guardsmen, do not bar a recovery under the Military and Naval Code. *Dudley, Et Al*, Claimants vs. *State of Illinois*, Respondent, 21 C.C.R. 255; *Roberts*, Claimant vs. *Stute of Illinois*, Respondent, 21 C.C.R. 406; *Sypniewski*, Claimant vs. *Stute of Illinois*, Respondent, 21 C.C.R. 586.

The test to be applied in these cases is not that of finding damages for like injuries in common law actions. The awards are rather to be made for financial help and assistance as the merits of each case may demand. Often-times this Court has used the Workmen's Compensation Act as a guide in arriving at an award in cases of this type. In doing so, however, the Court has not considered the Compensation Act to be either a ceiling over or a floor under the awards.

Here the claimant's earning capacity has unquestionably been affected. Although he is presently earning only nineteen cents less per hour than he earned before the injury, it is common knowledge that the wages of a jet engine mechanic have increased between 1954 and September, 1957, the date of the hearing. Considering the payments received in the hospital and from the group policy, the loss of his wages during his hospitalization has been off-set, and the 60% disability award, which he is receiving from the United States Government, is a substantial one in the amount of \$263.00 a month. Tak-

ing everything into consideration, we feel that an award of \$3,500.00 would be proper.

Claimant, Staff Sergeant Leon Brown, was 25 years of age, single, and employed as a dining servicer at \$1.17 per hour prior to the accident. He received a skull fracture, which resulted in diplopia of the right eye, and cuts to his face, which caused scars, and necessitated surgical repair of the right lower eyelid. He was hospitalized from July 23, 1954 to March 15, 1956. Claimant testified that he sustained a loss of wages during this time in the amount of \$4,256.00, and received Army pay in the amount of \$1,120.00 during that period, or a net loss of \$3,136.00. He also testified that he is receiving benefits under Public Law 108 in the amount of \$93.60 per month on a 50% disability rating. He stated that he has difficulty reading. He is now employed as a dining service helper by the United Airlines at the rate of \$1.48 an hour.

This injury is difficult to evaluate because of the meager medical information available. It does not even appear from claimant's testimony that he still has double vision. His testimony regarding his present condition is limited to the statement that he has difficulty reading. It is noted that he is making more at the present time than he was prior to the accident, and is engaged in the same type of work. None of the medical reports in the record are of recent date.

He appeared before the Physical Evaluation Board at the Walter Reed Hospital on December 16, 1954. There was no finding of permanency, but the designation on the Medical Board proceedings, petitioners' exhibit No. 5e, states "may be permanent". This was the last

report. No medical testimony was presented other than the reports.

In view of this state of the record, we believe that the amount of \$3,136.00, which is the loss of wages, is a proper award on this claim.

With respect to the claim of Sergeant Freddie Lewis, the evidence establishes that he was 25 years of age, married, and had no children. He was employed as a heat chaser by the United States Steel Company at \$1.73 per hour. He was hospitalized from July 23, 1954 to February 28, 1955. During this time he lost \$2,176.00 in pay, and received Army pay of \$1,200.00. He also received \$676.00 in accident and sick benefits during this period, being 26 weeks at \$26.00 a week, from the United States Steel Corporation. His injuries consisted of a fracture of the right acetabulum; dislocation of right hip; neuropathy, right sciatic nerve due to trauma; and, loss of rotation of the thigh. At the time of the hearing he was receiving \$109.00 per month from the Veterans Administration and the United States Army. He was then asked what percentage of disability he received, and his answer was "30% from one, and 30% from the other". Apparently this represents a disability award paid by the Federal Government.

The record is in such a condition that it is difficult to determine the extent and permanency of claimant's physical injuries. This claimant offered as exhibit No. 9b a Rating Sheet from the Veterans Administration Hospital, which is also a medical report. For want of more specific information concerning his condition we set it forth as follows:

"RATING SHEET"

Name	C-NO.	Date of Rating
Lewis, Freddie E.	19 035 002	5-18-56

Address	Service Serial No.	Date of Last Examination
		4-9-56

City	State	Date of Claim	Type War	Occupational Determination
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Type Disch.	Br. Service	Active Duty Date	Date R.A.D.
Hon.	Br.	7-10-54	2-28-55

Date of Birth	Place of Birth	Rank	Race Sex
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Ratings

Classification of Rating:—Initial—Confirmed—Increase X Decrease

VAR. 1009(E)—As Amended

Jurisdiction: Scheduled examination

Issue: Evaluation of service connection paralysis, sciatic nerve, right, residuals, dislocation, right hip.

Facts: The cited neurological examination reveals the veteran entered into the examining room with a short leg brace. The right lower extremity reveals a moderate atrophy of the quadriceps muscle and also of the gastrocnemius muscle, which is caused by disuse. The veteran is able to dorsiflex his right foot to the neutral point, meaning to the neutral position; and he can also evert and invert the right ankle. There seems to be no restriction of the ankle shown upon passive motion. The veteran does not walk with a typical steppage gait, and he has no complete foot drop. There is only a partial foot drop. Objective sensory testing reveals a hyperesthetic zone over the dorsal aspect of the right foot. The distribution of the superficial perineal nerve. The veteran is able to walk on his toes, and is able to lift his toes up to a certain degree while standing on his heels.

The orthopedic examination reveals there is noticeable atrophy of the right extremity when compared to the left. On pressure over the midline posterior aspect right thigh the veteran complains of a peculiar sensation like an electrical impulse. Hyper-extension of the right thigh at the hip is completely restricted. There is a slight restriction of both flexion of the right thigh at the hip actively and passively.

There is also some restriction, possibly 33% of full abduction and adduction, of the right thigh at the hip, and considerable restriction of internal rotation of the right thigh at the hip. In the right lower extremity is flexed at the hip, and knee dorsification can be performed to at least 33% of the normal range is accomplished both actively and passively, indicating that there is no foot drop of the right lower extremity at this time. There

is a minimal restriction of motion of the toes of the right foot, fibrous from immobilization.

The x-ray examination of the pelvis, including both hip joints, reveal there is evidence of a rather marked degree of deformity noted involving **the** right acetabulum, as well as the head of the right femur and the **right** femoral neck. The region of the right acetabulum appears to be displaced centrally as compared with the left. A few small irregular areas of bony density are noted within the soft tissues adjacent to the right femoral neck and greater trochanter.

Discussion: In view of the evidence, a decrease in evaluation is warranted.
Var. 1009 (E)—as amended.

1 Incurred Pl 28/82nd C **VR** 1(a) Part I, Par. 1(a).

60% from 3-1-55 to 7-17-56

20% from 7-18-56

8520-955 Paralysis, sciatic nerve, right, incomplete, moderate

10% from 3-1-55

5253 Residual, dislocation, right hip

60% from 3-1-55 to 7-17-56

COMB: **30%** from 7-18-56

32 No combat

8-2507—4-9-58

Medical Rating Specialist	Claims Rating Specialist	Occupational Rating Specialist
/s/ B. A. Salzberg	/s/ J. E. Rymsza	/s/ John R. O'Connor
B. A. Salzberg, M.D.	J. E. Rymsza, Chrm.	John R. O'Connor
Rating Board No.	Name of VA Station	
1	3028-Chicago	

VA Form

July, 1954

Existing Stocks of VA Form VA DC 189462

VB 8-564a 564a Sept., 1939 Will Be Used

Petitioners' exhibit No. 9C"

Claimant testified that he has not worked since the date of the accident, and that he feels unable to do any work. He stated that he was still under the treatment of a doctor at the Veteran's Hospital once every two months, and that he was taking a course of instruction under the Veterans Administration rehabilitation program. He applied for work at U. S. Steel on March 7, 1955, again in May of 1955, and on two other occasions,

the dates of which were not stated in the record. On each of these occasions his application was turned down because of his physical condition.

It is difficult to evaluate this claim, since there is no direct testimony regarding permanency or of the extent of disability other than the record quoted above. In this report it is apparent that he is improving to some extent.

Claimant's own testimony leaves much to be desired with reference to his present condition, i.e., what he can or cannot do. We believe, however, that the record justifies an award in the amount of \$5,500.00.

Claimant, Sergeant Willie Britton, Jr., age 26, was employed by Western Electric at the rate of \$1.51 per hour. He was hospitalized from July 23, 1954 to November, 1954 for a dislocated shoulder. He sustained loss of wages in the amount of \$1,885.00 during this hospitalization period, and received Army pay of \$985.00, representing a total net loss of pay in the amount of \$900.00. After his hospital release he reported back for general military duty. He later returned to his employment with Western Electric on February 2, 1955. There was no testimony offered with respect to his present condition, and, consequently, we must presume that the injury healed correctly. We, therefore, recommend an award in the amount of \$900.00.

Claimant, Staff Sergeant Burton Mosley, age 25 years, married, and the father of one child was employed by the City of Chicago Police Department at a salary of \$325.00 per month. He received multiple abrasions to the arm, head, back and face, resulting in permanent scars. He testified that he was hospitalized for five or six weeks. He suffered no loss of wages, inasmuch as he

received his regular salary during that time. He stated that he returned to work three days after he left the hospital. He complains of headaches and pain in the shoulder. From the record it appears that he lost no wages, was not permanently injured, nor has his earning capacity been affected. We believe that upon this record no award can be made.

Claimant, Private Willie Walker, age **34**, married, and father of five children, was employed by the United Steel Company at the rate of \$1.57 per hour. He was hospitalized from July **23**, 1954 to September 9, 1954. His injury was a fracture of the left third metacarpal. He testified that he sustained a loss of wages in the amount of \$390.00 during his hospitalization. He received Army pay in the amount of \$97.00, making a net loss in the amount of \$293.00. After his discharge, he returned to work for the United States Steel Company. He testified that thereafter his hand gave him no further trouble. We feel that an award of \$293.00 would be a proper award to make on this claim.

Claimant, Katie Aaron, widow of the deceased, Sergeant First Class Lester Aaron, for herself and the minor children of Lester Aaron, deceased, testified that she is the widow of Lester Aaron, and that the following named children had been born to the marriage: Linel Aaron, age 9, Lester Aaron, Jr., age 5, Loretta Aaron, age 3, and Larry Aaron, age 2, all of whom survived their father, Lester Aaron. She stated that his annual earnings were \$3,400.00, and that he was employed at the United States Post Office in Chicago. Lester Aaron was 32 years of age at the time of his death. She further testified that she receives \$208.00 per month from the Veterans Administration as benefits resulting from the

death of her husband. There was no testimony regarding her earnings, if any. We feel that the following awards should be made with respect to this claim: Katie Aaron, \$3,500.00; Katie Aaron, Guardian of Linel Aaron, A Minor, \$2,500.00; Katie Aaron, Guardian of Lester Aaron, Jr., A Minor, \$2,500.00; Katie Aaron, Guardian of Loretta Aaron, A Minor, \$2,500.00; and, Katie Aaron, Guardian of Larry Aaron, A Minor, \$2,500.00. The awards to Katie Aaron, as Guardian of the estates of the respective children, are made with the understanding that she will be appointed Guardian by the Probate Court of Cook County, Illinois.

The claim of Leon Dunham is hereby allowed in the amount of \$3,500.00.

The claim of Leon Brown is hereby allowed in the amount of \$3,136.00.

The claim of Freddie Lewis is hereby allowed in the amount of \$5,500.00.

The claim of Willie Britton, Jr., is hereby allowed in the amount of \$900.00.

The claim of Burton Mosley is hereby denied.

The claim of Willie Walker is hereby allowed in the amount of \$293.00.

The claim of Katie Aaron is hereby allowed in the amount of \$3,500.00.

The claim of Linel Aaron is hereby allowed in the amount of \$2,500.00.

The claim of Lester Aaron, Jr., is hereby allowed in the amount of \$2,500.00.

The claim of Loretta Aaron is hereby allowed in the amount of \$2,500.00.

The claim of Larry Aaron is hereby allowed in the amount of \$2,500.00.

(No. 4764—Claimant awarded \$247.42.)

WALTER H. GIFFORD, JR., Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed March 26, 1959.

CHARLES G. LIND, Attorney for Claimant.

LATHAM CASTLE, Attorney General; RICHARD F.
SIMAN, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*negligence*. Evidence showed that operator of a National Guard truck was negligent in driving vehicle into back of claimant's automobile, which had come to a stop in the line of traffic at intersection.

WHAM, J.

This is a claim in the sum of **\$247.42** for damages to claimant's automobile arising out of a collision between claimant's automobile and an Illinois National Guard truck. The accident occurred on February 28, 1956 in Chicago, Illinois.

The case is submitted to this Court upon a stipulation of facts duly entered into by claimant and respondent, a sworn statement in the nature of a complaint signed by claimant, and a repair bill of the Davis Oldsmobile Company in the amount of **\$247.42**, which has been marked paid.

The stipulation of facts, which was signed by claimant's attorney and the Attorney General for the State of Illinois, reads as follows:

"It is hereby stipulated by and between Walter H. Gifford, Jr., and the State of Illinois, through their counsels, Charles G. Lind and the Attorney General of the State of Illinois, respectively, as follows:

1. That on February 28, 1956, plaintiffs automobile was damaged by a truck belonging to the Illinois National Guard, 234 E. Chicago Avenue, Chicago, Illinois, and that said truck was being driven by Sgt. Gus C. Anagnost, Battery A, 768th AAA Bn., Illinois National Guard.

2. That the accident took place on Chicago Avenue at Dearborn Street in Chicago, Illinois, and that plaintiff was not of fault.

3. That as a result of said accident plaintiffs car was damaged to the extent of \$247.42 as per statement of the Davis Oldsmobile Company of

Chicago, Illinois, dated March 5, 1956, a copy of which is attached hereto and marked exhibit A, and paid by check on March 10, 1956, a copy of which is attached hereto and marked exhibit B.

4. That the State of Illinois admits liability in the above matter, and that plaintiff has suffered damages to the extent of \$247.42, plus cost of suit-exhibit C.

5. That plaintiff does not claim any personal injuries as a result of the accident herein mentioned."

From the record in this case, including the stipulation, it appears that respondent's vehicle was being driven by its agent, Sgt. Gus C. Anagnost, a member of the Illinois National Guard, in the regular course of his duty and scope of employment. Claimant had stopped in the line of traffic headed east on Chicago Avenue at its intersection with Dearborn Street in the City of Chicago, and respondent's truck, while being driven by Sgt. Anagnost, ran into the back of claimant's vehicle. Sgt. Anagnost was unable to bring the truck to a stop, and the damages stipulated to in the amount of \$247.42 resulted.

This record is sufficient to establish negligence upon the part of respondent, which proximately caused the damages in question, and due care and caution on the part of claimant. Therefore, this claim is hereby allowed in the sum of \$247.42.

(No. 4765—Claimant awarded \$2,500.00.)

JOHN FURRY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 26, 1959.

JOHN S. GILSTER, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—personal injuries. Evidence showed that respondent's agents were negligent in not having blasting operations followed by a clean up crew prior to assigning claimant to work where there was danger from falling rocks.

FEARER, J.

Claimant, John Furry, filed a complaint in this Court on March 6, 1957, for the recovery of damages to his left knee sustained in an accident, which occurred on March 11, 1955, while he was an inmate of the Illinois State Penitentiary at Menard, Illinois, serving a term from two to ten years.

On March 11, 1955, claimant was assigned to a detail to pick up loose rocks and place them in a car for removal to a rock crusher. The day previous, respondent's agents and employees had blasted rock from a hill immediately above where claimant was working.

Apparently all of the loose rock on the hill above had not been removed or pushed to the ground below, where claimant and other inmates were working the following day, so that while claimant was so engaged and standing within 15 to 20 feet from the base of the cliff, a large rock, described as being approximately 300 to 500 lbs. in weight, fell from the cliff above.

It was the practice of the authorities in directing this work to be done to have the blasting operation followed by a clean up gang, who would remove and fell to the ground below all loose rocks, using crowbars to displace the rock, which might become disengaged and fall while the men were working below.

Claimant testified, and it was uncontradicted by respondent, that, after blasting operations the day before, the clean up gang did not remove the loose rock, and thereby provide a safe place for claimant and the other inmates to work the following day.

The negligence charged is that respondent assigned claimant to work in a place without providing safe conditions and failure to follow approved quarry practices.

Other charges of negligence of respondent were also alleged in the complaint.

No answer having been filed by respondent under Rule 11 of this Court, a general traverse or denial of the facts shall be considered as filed.

Respondent did not offer any testimony at the hearing of this case before the Commissioner, but filed a Departmental Report, which is summarized as follows:

On March 11, 1955, at 8:45 A.M., John Furry was struck on the left knee by falling rock from overhead, while assigned to the quarry at the Illinois State Penitentiary at Menard, Illinois.

In obedience to an order of respondent's agents he entered upon the performance of his work in the quarry, which consisted of picking up loose rocks, which had been blasted from the ground. He was then supposed to deposit them in cars to be conveyed to the rock crusher.

There is also attached to the Departmental Report an accident report with letter written by Dr. D. S. Wham, M.D., prison physician, directed to Mr. Ross V. Randolph, warden of the institution, dated April 5, 1957. Summarizing the report, the doctor says that Mr. Furry was brought to the prison hospital on March 11, 1955 after injuring his left knee in the quarry. His examination revealed a laceration on the left knee, which was leaking synovial fluid, indicating that the injury had penetrated the joint cavity. Treatment given at the time was the cleansing and suturing of the wound. Claimant was examined also by Dr. Weatherly, who examined the knee in April, 1955. His diagnosis was that a milk synovitis was present.

In May, 1955, further treatment of the knee was given because of further damage to it, which occurred

when claimant was running, and at that time 40 cc of bloody fluid was withdrawn. In the meantime, he received treatment to the knee for residual discomfort and stiffness.

The report of Dr. Wham, dated April 5, 1957, indicated that a physical examination revealed pain, stiffness and weakness of the left knee with mild instability and a moderate limp while walking. There was no swelling or inflammation around the joint, and an x-ray taken on April 5, 1957 showed an essentially normal knee joint with no evidence of inflammation or roughening of the joint surface.

Dr. Wham's diagnosis was as follows :

"Mild chronic synovitis ~~of~~ the left knee with *a* possible element of intra-articular and peri-articular soft tissue derangement. Much of the weakness is due to disuse atrophy, due to favoring the injured knee. Disability is minimal."

Claimant was examined by Dr. Francis E. Bihss, who made a radiographic examination of the left knee, and reported :

"Reveals a deformity noted through the outer portion of the condyle of the tibia, with some irregularity of the tibial spines. There is marked narrowing of the joint space between the lateral condyle of the tibia and the femur, indicating that there was an injury, probably, to the outer condyle of the tibia; however, the fracture line was not demonstrable at this examination. There is definite narrowing of the joint space between the lateral articulating portion of the femur and that of the condyle of the tibia."

It was suggested at the time of the trial that an orthopedic surgeon be called in to examine claimant.

This examination was made by Drs. Kilian F. Fritsch, Bart Cole and Lloyd Hill. This medical report was admitted in evidence, and reveals the following facts:

Claimant was examined in the doctors' office on January 21, 1958. At the time of this examination, claimant stated that he had experienced locking of the knee; that the first thing in the morning the knee feels like it is going to buckle on him; that there is numbness around the knee joint; and, that the patient has not worked since his discharge. At the time of the examination he was still wearing an elastic bandage.

The doctors' objective findings were that there was a scar 4 inches long over the medial side of the left knee, and that there is no lateral but some medial instability of the knee. There is no anterior or posterior instability. When he stands with the knee slightly flexed, there is some instability of the medial side of the knee joint. There was no fluid in the knee joint at the time of the examination. Claimant stated to the doctors that he has some suffering in the left knee intermittently. There is complete flexion. From the measurements made, there appears to be no atrophy of the left leg. Subjectively, the patient stated that he has had quite a bit of trouble with the left knee, and it locks on him at times, which indicates some injury to the medial knee cartilage, and a weakness of the medial collateral ligaments of the knee joint.

The doctors recommended that claimant should do quadriceps exercises, and use progressive resistance with weight lifting.

An x-ray taken at the time of the examination showed some deformity of the outer condyle of the tibia, and that there was a narrowing of the joint line laterally.

The medial collateral ligaments were relaxed as a result of the tear and injury. The doctors estimated that claimant had about a 25% to 30% residual disability in the left leg.

Claimant testified that he was 28 years of age, and that his employment at the time he was committed to the penitentiary was a inachinst and molder. His earnings were in excess of \$2.00 an hour. Since the injury, he has been unable to stand on his leg for any considerable length of time, because of the weakness in his left knee. There is no evidence of a previous injury to the knee, which could be considered as a contributing factor.

From an examination of the record, which includes the Departmental Report and briefs and arguments submitted by both plaintiff and respondent, me believe that claimant has maintained the burden of proof in this case, and has established :

First : He was not guilty of contributory negligence.

Second : Respondent's agents, the guards in charge of the duties assigned to claimant and others, were negligent in that they permitted the blasting of the rock above where claimant was working on the day of the accident without assigning a detail to clean up all of the loose rock before permitting claimant and others to work within 15 feet of the cliff.

Third: Claimant did suffer damage with approximately a 25% disability to his left leg by reason of the injury to his knee.

It is rather difficult to arrive at an amount for an award to be given claimant, inasmuch as this is not a compensation matter, but rather a common law action authorized by the laws of this State, made and provided thereby. This Court so held in the case of *McElyea vs. State of Illinois*, 7 C.C.R. 63.

There is no evidence as to what type of work claimant might do, and what he might earn upon being released from the penitentiary. From the record it appears that he was to be released the month following the date of the trial, which would have been in January of 1958.

We have no evidence as to loss of earnings due to the fact that he was confined to the penitentiary at the time of the hearing. If we were to use the compensation act as to a percentage of the loss of use of leg, we still would have to have a weekly rate in order to arrive at a fair and just amount for the injury.

Under the circumstances, it makes it somewhat speculative to arrive at a fair amount. The amount of the award will have to be based upon the medical testimony as to the limitation claimant has in his left leg, and the pain and suffering endured by him, and, in addition, consideration will have to be given to the length of time he was hospitalized. We are inclined to agree with the Commissioner, who recommended an award of \$2,500.00 to this Court.

It is, therefore, the order of this Court that an award be made to claimant, John Furry, in the amount of \$2,500.00.

(No. 3768—Claim denied.)

AMERICAN STATES INSURANCE COMPANY AND UNION AUTOMOBILE
INDEMNITY ASSOCIATION, Claimants, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed March 26, 1959.

BURRELL AND HOLTAN, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; SAMUEL J. DOY,
Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*damages by escaped inmates—effect of recommendation Of Illinois Youth Commission.* A recommendation filed pursuant to Chap. 23, Par. 372a, is advisory only, and the Court of Claims may **make** or deny an award with or without a favorable recommendation.

SAME—escaped inmates—burden of proof. To recover for damages caused by escaped inmates, it is necessary to allege and prove that the State was negligent in allowing the inmates to escape.

WHAM, J.

Claimants bring this action to recover on their respective subrogation claims for damages arising out of an automobile collision.

On August 29, 1955, one Mike DeSimone, a sixteen year old inmate of the Savanna Encampment of the St. Charles Boys Reformatory, and another inmate, Ronald Chiquet, also sixteen years of age, escaped, took unlawful possession of a Pontiac automobile belonging to Harold Schroeder at Savanna, Illinois, and, while being pursued by the police, collided with a parked Olclsmobile automobile owned by Dr. L. B. Hussey in Savanna, causing damages to both vehicles, which were insured for collision loss.

Claimant, American States Insurance Company, was the insurer of the Schroeder automobile, which was damaged in the amount of \$668.50, and claimant, Union Automobile Indemnity Association, was the insurer of the Hussep automobile, which was damaged in the amount of \$1,915.00.

Claimants contend that the State of Illinois was negligent in failing to control the activities of its wards, and should respond in damages.

Respondent does not dispute the facts set forth above, the amount of damages sustained, nor that claimants are the proper parties in interest. Respondent contends, however, that the State of Illinois was guilty of no negligence

proximately causing the damages, and that, therefore, 110 recovery should be allowed.

The Illinois Youth Commission, in accordance with the provisions of Chap. 23, Par. 372a, Ill. Rev. Stats. (1955 State Bar Association Edition), conducted an investigation of the occurrence. The report of the investigation was offered by claimants as their exhibit No. 1. The Commission in its report found that the damages claimed had been caused by the two escaped inmates, and recommended as follows: "It is our opinion that claimants in this case are entitled to compensation for the damages to their property as a result of the actions of Michael DeSimone and Ronald Chiquet, wards of the Illinois Youth Commission, who were assigned to the Mississippi Palisades State Boys' Camp at Savanna, Illinois."

In studying the report of the Commission. we note that no facts bearing on the disputed question of negligence appear, and, consequently, the recommendation must first be considered in the light of the evidence brought out at the hearing before being either accepted or rejected by this Court.

As we stated in the case of the *Dixon Fruit Company, Et Al* vs. *State of Illinois*, No. 4662, with respect to the effect of a commission's or department's recommendation for or against the allowance of such a claim, or the lack of such a recommendation, "The statute provides that the defendant shall make an investigation, and 'may recommend to the Court of Claims that an award be made to the injured party, and the Court of Claims shall have the power to hear and determine such claim'. If the Legislature intended the department (or commission) to be the final arbiter, there would be no reason

to refer the matter to the Court of Claims. We think rather the Legislature intended that the department could recommend favorable consideration, if it saw fit, and the Court of Claims would be entitled to either accept such recommendation, or at least take it into consideration. We do not believe, however, that, because of the lack of a favorable recommendation, the Court of Claims could not hear and determine the claim itself."

Conversely, the fact that a favorable recommendation is made is likewise not binding upon this Court, but may be considered in the light of the evidence.

As to the applicable test by which this claim is to be judged, we stated in the above case: "The statute does not spell out the test to be applied, but it is significant to note that nowhere in the statute is there any wording, which specifically directs the Court of Claims to apply the test of absolute liability. Such direction being absent, we will not presume that the Legislature so intended. It is more reasonable to presume that the Legislature intended the Court to utilize some discretion, and we, therefore, until otherwise directed by the Legislature, will allow claims under the statute only in the event that we find the State to have been at fault." .

Each of these escape cases rests upon their own peculiar set of facts and circumstances.

In the Dixon Fruit Company case we allowed a recovery for the burning of a truck by an escaped inmate of the Dixon State School, who mas a known mental defective with an exhibited tendency toward incendiarism, and who was allowed to wander at will without supervision in an institution wherein there were no restraining walls or other means of controlling his movements. We felt that there was a sufficient showing of negligence in

that the State of Illinois should have foreseen the consequences, inasmuch as the institution's location was within the city of Dixon where property of many persons would be jeopardized by the activities of such a patient. We felt that the State of Illinois exposed the public to an unreasonable risk.

We have recently allowed a recovery in the case of *Martha Callbeck vs. State of Illinois*, No. 4612, for personal injuries sustained by a female employee living on the grounds of the Chicago State Hospital, an institution operated by the State for the mentally ill, when assaulted in her quarters on the grounds in the early morning hours by a dangerous homicidal patient, who had been allowed to go at large upon the grounds in the darkness without surveillance.

In a case similar to that last cited, the Court in *Mary Malloy vs. State of Illinois*, 18 C.C.R. 137, allowed a recovery for a female person assaulted by a criminally insane prisoner, who had escaped, because of insufficient surveillance from the Illinois Security Hospital.

In each of the above cases, the wards of the State were clearly dangerous mental defectives, and not of the type that should have been permitted to roam unattended, but rather should have been subjected to close surveillance at all times. The precise consequences of the State's failure to control their activities should have been foreseen by those in whose custody they were committed.

Here, however, the evidence does not disclose such a situation.

The facts respecting the confinement of DeSimone reflect that he had been committed to the custody of the Illinois Youth Commission in the latter part of 1953 at the age of fourteen. He was the product of a disoriented

home life, his parents were divorced, he had run away from home, had been placed in an orphanage, and had been brought before the County Court of Cook County after having run away from the orphanage, lived as a vagrant, and stolen a bicycle. His assignment to the Illinois Youth Commission was brought about because of the placement problem presented.

Joseph Patrick Munday, Superintendent of the Division of Forestry Camps for the Illinois Youth Commission, testified that he first met DeSimone when he was in the custody of the Family Court as a dependent child in 1951, when DeSimone was twelve years of age. He was under the care of the Family Court for approximately eight to nine years primarily because of his home situation. He again met DeSimone as parole officer for the Illinois Industrial School for Boys at Sheridan, Illinois.

DeSimone had originally been assigned by the Youth Commission to the Illinois State Training School for Boys at St. Charles. He had been transferred to the Industrial School for closer and more controlled confinement, and to help prepare him for parole eligibility.

After consideration of his case by Mr. Munday and the Superintendent of that institution, it was determined that DeSimone had progressed to a point where he was ready for an open type institution. He was transferred to the Savanna Encampment by order of the Youth Commission upon the recommendation of Mr. Munday and the Superintendent, which recommendation was based upon his record, including approximately fifteen months at the Sheridan Industrial School. This transfer took place in May of 1955, and, according to the testimony of Mr. Munday, his adjustment was "fair to average,".

He was disturbed by the approaching electrocution

of his older brother for murder, and Mr. Munday had, with his knowledge, arranged for him to visit his brother in the **Cook** County jail. This visit was scheduled for the week following his escape.

Mr. Munday had seen and talked with DeSimone on numerous occasions after his transfer, and as late as approximately 10 A. M. on the morning of the escape. He had arranged a duty assignment for DeSimone in the camp area, so that the camp counsellor would be able to work closely with him and help him, because of his known disturbance over the approaching electrocution. Mr. Munday testified that ((thefurtherest thought from my mind was his running away”.

Claimant contends that a notation taken from DeSimone's record placed the authorities on notice that DeSimone was preparing to escape. In an unsigned memorandum, dated July 28, 1955, claimant's exhibit No. 2, it was noted along with a general review of his progress at the encampment, “It has been reported that Mike was going to run away, but this never came to actuality”.

When this notation is taken into consideration with the fact that he had been in the encampment for more than two months prior and one month subsequent to the date of the memorandum without making any attempt to escape, and when such notation was apparently no more than reported rumor at the time it was made, we cannot find that any such notice should be charged to the State from this notation. To hold otherwise on this question would have the end result of requiring the State to transfer such an inmate back to the Industrial School immediately upon the receipt of any like rumor, or keep the inmate at the State's peril from that time on. Obviously, such a policy would be neither wise nor just.

The person apparently closest to DeSimone, namely, Mr. Munday, who had shown an interest in and befriended him, who had made arrangements for him to visit his brother, and who had often visited with him, had no idea he was planning to escape.

Could we say that in the light of this situation that Mr. Munday should have known of a plan to escape from the mere notation in the record made one month prior to his last visit with DeSimone? To the contrary, on the date of the escape the reasonable assumption was that he would remain in the encampment, inasmuch as that course of action represented his only opportunity to visit his brother, whom he apparently highly regarded.

It is not the occurrence of the escape, but rather what condition existed prior to the escape, that is to be considered. It is foresight, rather than hindsight, that is pertinent.

Claimants also call our attention to claimants' exhibit No. 3, a social history of DeSimone, bearing date of October 14, 1953, made when he was fourteen years of age, and referring to his unfortunate home life, his running away from home, school and an orphanage as significant notice of his planned escape.

In the same light, claimants also call our attention to exhibit No. 4, dated March 22, 1954, which was a report; of a staff meeting at the Reception Center at St. Charles recommending his transfer to the Industrial School for Boys at Sheridan. This report refers to the social history, and adds thereto information that he had run away from the Illinois State Training School for Boys on three occasions, the last being March 9, 1954. These represent, his record prior to his transfer to the Industrial School

where he served at least fifteen months before being transferred to the Savanna Encampment.

The only evidence before us with respect to his progress after being transferred to the Industrial School was that in the judgment of the authorities he had been rehabilitated to the extent that they felt it proper to transfer him to the open type confinement afforded by the facilities of the Savanna Encampment. Nothing appears from the evidence reflecting any reason for not making the transfer.

The Savanna Encampment, as described by Victor Robert Griffin, Superintendent of the Reception Center of the Illinois Youth Commission, was "the nearest step to parole". He further testified that the boys assigned to that institution were allowed to walk around certain areas; that there were no fences or walls; and that the degree of supervision was not designed to watch every boy every moment, but, rather, it was designed to promote an increased degree of permanence in the self-improvement of the boy.

It goes without saying that rehabilitation is the fundamental aim of the Youth Commission program. Decisions as to the placement and progress of these youths must be made by utilizing the best judgment of professional persons trained in administering this program. It is not an exact science, and cannot be administered by a slide rule. It is certain that instances will occur wherein the results of attempted rehabilitation are disappointing. Such instances by no means indicate faulty administration of the program. The duty of the State personnel in exercising the discretion required is not that of an insurer that each boy assigned to the encampment will perform satisfactorily, any more than that the parole board

should be held to guarantee that a parolee will commit no further crimes. The only duty, which is required, is one of reasonable exercise of discretion. We find that the authorities in assigning DeSimone to the encampment, exercised their discretion in a reasonable manner.

Claimants in their reply brief acknowledge that "claimants do not assert that respondent was negligent in putting the boys in an open camp at Savanna". Therefore, inasmuch as the decision was properly made to transfer DeSimone to the Savanna Encampment, the type of custody to which he was to be subjected at such institution need only have been exerted in accordance with the standards applicable to others assigned to that institution.

If we were to require such an institution as the Savanna Encampment to provide maximum custody over certain boys and minimum custody over the others, it would defeat the purpose of this type of institution, and make the system unworkable.

As to Ronald Chiquet, we have considered the record, and reached the same conclusion as we did to DeSimone. Claimants make no contention that respondent had notice of his planned escape. They refer only to the fact that he had a history of burglary and larceny, and was "riddled with anxiety, guilt and hostility".

Mr. Griffin testified that Chiquet, after being assigned to the Youth Commission in November or December, 1953, was placed in the State Training School for Boys at St. Charles, and that he "responded very well in the school program . . . and it was recommended that he be transferred to a camp". The transfer was made in May, 1955. We find that he, too, was properly assigned to the encampment.

As to the escape, which occurred, the testimony of Jewel Sulser, work supervisor and one of the guards, is summarized as follows :

DeSimone and Chiquet were in bed at 9:30 P. M., at which time the lights were out. A guard, Bill Watkins, was on duty in the barrack in which the boys were quartered. This guard remained on duty all night in an adjoining room, and each thirty minutes conducted a bed check of the inmates.

Mr. Sulser was quartered in a barrack approximately forty feet from that in which DeSimone and Chiquet slept. He, Sulser, was in bed when he heard a ping pong ball on the floor in the recreation room in his barrack. He got up, looked out, and saw the two boys, who had left the barrack between bed checks, walking toward the bathroom. He called Mr. Watkins, got up, partially dressed, and, along with Watkins, went to the bathroom some three hundred feet from the barracks in an attempt to find the boys. The rules of the encampment permitted them to go to the bathroom unattended by a guard after obtaining permission.

Upon failing to discover the boys, they returned to the barracks to put on more clothes, saw the boys go around the building one hundred and twenty feet away, and on into the woods. After awakening a third man to watch the barracks, Sulser and Watkins drove an automobile after the boys, and came upon the scene of the wreck in Savanna.

The action on the part of Sulser and Watkins does not impress us as unreasonable or negligent in the light of the type of institution involved. They were not charged with caring for insane maniacs and murderers, but rather boys, who had progressed to a rehabilitated status and were practically on parole.

There is no evidence pointing toward any violation of rules by either Sulser or Watkins. The activities of DeSimone and Chiquet were in no sense of the word ignored, but on the contrary received prompt attention. Just what claimants contend should have been done by Sulser and Watkins, which was not done, does not appear. Certainly, claimants would not contend that the boys should have been shot, and it is apparent that ordering them to stop would have had no effect.

The system of guarding the boys assigned to the camp has not been questioned by claimants except to state that DeSimone should have been more thoroughly guarded. We have previously discussed this question, and held that, since he was properly assigned to the camp, the same degree of care and custody applicable to the others so assigned was all that could reasonably be required as to him for as long as he was properly assigned to the encampment.

In view of the above, we find that claimants have failed to establish a compensable case. In order to allow this claim, we would be required to hold that the State is an insurer of its wards' activities. This is not the law, and the claims must, therefore, be denied.

(No. 4824—Claim denied.)

BENNIE TRUITT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 24, 1958.

Supplemental opinion filed March 26, 1959.

SPENCER T. HARDP, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

JURISDICTION—limitations. Where claim for wrongful imprisonment was not filed within two years after discharge from prison, Court has no jurisdiction to hear claim.

TOLSON, C. J.

On May 28, 1958, Bennie Truitt filed his complaint against the State of Illinois, in which he seeks damages in the amount of \$150,000.00 for alleged wrongful incarceration.

On June 26, 1958, respondent filed a motion to dismiss for the following reasons:

1. The claim alleged is barred by the prior decision of this Court filed on October 22, 1954 in case No. 4637.
2. The claim alleged is not within the jurisdiction of this Court for the reason that it is not alleged that the claimant was innocent of the crime for which he was imprisoned, as required by Par. 439.8, Chap. 37, 1957 Ill. Rev. Stats.
3. The claim was not filed within the time limited by law.

On July 7, 1958, claimant fled an amended complaint, and charged the Parole and Pardon Board of the State with certain errors and omissions, This amended complaint is so vague and uncertain that the Court, on its own motion, must dismiss it as being legally insufficient.

It is of interest to note that this matter has heretofore been before the Court in case No. 4637. In this prior case, claimant was represented by counsel, and this Court dismissed the complaint on the grounds that it had no authority to make an award in any case involving wrongful incarceration.

In 1957 the Legislature amended the Court of Claims Act in the following particulars:

JURISDICTION

- “(A) _____
 (B) _____
 (C) All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned; provided, the Court

shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than \$15,000; for imprisonment of 14 years or less but over 5 years, not more than \$30,000; for imprisonment of over 14 years, not more than \$35,000; and provided further, the Court shall fix attorney's fees not to exceed 25% of the award granted."

LIMITATIONS

"

Every claim cognizable by the Court arising under subsection C of Section 8 of this Act shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within 2 years after the person asserting such claim is discharged from prison, or is granted a pardon by the Governor, whichever occurs later."

Taking the case in its most favorable light for claimant, it appears of record that claimant was committed to the Illinois State Penitentiary on July 31, 1914, and was thereafter released on March 2, 1945. For claimant to prevail, his complaint would have had to be on file by March 2, 1947. Under existing law, there is no way that claimant can come within the provisions of the amendment.

The motion of respondent to dismiss is, therefore, allowed.

SUPPLEMENTAL OPINION

On May 28, 1958, Bennie Truitt, pro se, filed his complaint against the State of Illinois seeking damages in the amount of \$150,000.00 for alleged wrongful incarceration. On June 26, 1958, respondent filed a motion to dismiss the case for the following reasons:

1. The claim alleged is barred by the prior decision of this Court filed on October 22, 1954 in case No. 4637.
2. The claim alleged is not within the jurisdiction of this Court for the reason that it is not alleged that claimant was innocent of the crime for which he was imprisoned, as required by Par. 439.8, Chap. 37, 1957 Ill. Rev. Stats.
3. The claim was not filed within the time limited by law.

On July 7, 1958, claimant filed an amended complaint, and charged the Parole and Pardon Board of the State of Illinois with certain errors and omissions. This amended complaint was so vague and uncertain that the Court, on its own motion, did dismiss it as being legally insufficient.

On December 2, 1958, claimant secured counsel, who filed an amended petition and brief in support thereof. On December 19, 1958, respondent filed a motion to strike the amended petition on the ground that it was barred by the statute of limitations. On January 7, 1959, claimant filed an answer to the motion to strike, and the matter is now before this Court on the motion and answer.

The Legislature, in 1957, amended the Court of Claims Act in the following particulars:

JURISDICTION—Chap. 37, Sec. 439.8, 1957 Ill. Rev. Stats.

- (A) _____
- (B) _____
- (C) All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned; provided, the Court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than \$15,000; for imprisonment of 14 years or less but over 5 years, not more than \$30,000; for imprisonment of over 14 years, not more than \$35,000; and provided, further, the Court shall fix attorney's fees not to exceed 25% of the award granted."

LIMITATIONS—Sec. 439.22

2

 Every claim cognizable by the Court arising under subsection C of Section 8 of this Act shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within 2 years after the person asserting such claim is discharged from prison, or is granted a pardon by the Governor, whichever occurs later."

Counsel in his brief alleges that his client's claim was dismissed in 1954 (Case No. 4637) on the grounds that

the Court was without authority to consider any claim involving wrongful incarceration, but that claimant took advantage of every legal step in his power to keep his claim alive.

He now alleges that Sees. 439.8 and 439.24 are in direct conflict, that to give a literal interpretation to Sec. 439.8 would be to take away rights that have accrued without providing a remedy, and that the Legislature by enacting Sec. 439.24 attempted to remedy the situation.

This Court does not believe that the proposition is a correct statement of the law. No person has a vested or a common law right for compensation for wrongful incarceration.

Prior to 1957 an aggrieved party was required to secure a direct appropriation from the Legislature for compensation, and every case filed in the Court of Claims was dismissed on motion for the reason that the Court, had no authority to make an award.

In 1957, the Legislature, recognizing the inequities of these cases, provided a remedy, as well as a statute of limitations. It is to be noted that the statute makes no provision by a savings clause for persons in the position of claimant. Having created a remedy for the first time, the Legislature has restricted its operation to a two year period from the time the right accrued.

Without considering the merits of the case, this Court finds that there is no way that claimant can secure relief in the Court of Claims, and that his only remedy is in the Legislature.

The motion to strike the amended complaint is, therefore, allowed.

(No. 4826—Claimant awarded \$12,067.35.)

HENRY W. LARSON, D/B/A GENERAL INSULATION COMPANY,
Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion fled March 26, 1959.

MARTIN, CRAIG, CHESTER AND SONNENSCHIN, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

CONTRACTS—*claim of subcontractor.* Evidence showed that the subcontractor had fulfilled his obligations and performed the work satisfactorily, that he had notified the Department of his claim against the contractor but had not been paid, and was entitled to an award.

FEARER, J.

Henry W. Larson, d/b/a General Insulation Company, filed his complaint in two counts in this Court on June 12, 1958, and asked for an award of \$12,067.35.

In Count I it is alleged that on or about December 20, 1949, respondent, by and through the Department of Public Works and Buildings, and the Eiswirth Construction and Equipment Company, An Illinois Corporation, as contractor, entered into an agreement, under the terms of which the Eiswirth Construction and Equipment Company, the contractor, agreed to furnish labor and materials to complete work called for in a certain proposal No. 3, as shown on drawings described in the specifications, and entitled "Heating and Plumbing Work, Rehabilitation and Modernization of Main Building—North Unit, Anna State Hospital, Anna, Illinois". This was referred to as contract No. 66220 on the records of the Division of Architecture and Engineering of the Department of Public Works and Buildings.

On or about April 5, 1950, claimant accepted a written proposal, which was submitted by the Eiswirth

Construction and Equipment Company, for him to furnish and install all insulation on the job, in accordance with the plans and specifications (with one exception stated in said written proposal), for the sum of \$12,150.00.

Claimant alleges that he entered upon the performance of the work specified in said proposal, furnished **all** labor and materials called for thereby in a good and workmanlike manner, and that the last item of labor or materials furnished to the job was on or about June 1, 1952.

It is further alleged that claimant made repeated demands upon the Eiswirth Construction and Equipment Company, the contractor, for payments of the amounts due from time to time as the work progressed, and for final payment upon completion of his work, but that no payments were made or received from the contractor, in accordance with the agreement that he had relative to furnishing labor and material. After allowing all just credits and setoffs there was due on and after June 1, 1952, and there is now due from the Eiswirth Construction and Equipment Company, the sum of \$12,067.35.

From time to time as the various amounts became due under said subcontract, claimant notified the Division of Architecture and Engineering in writing.

It further appears from the complaint filed herein that other subcontractors of the Eiswirth Construction and Equipment Company had notified the Division of their respective claims, but, in spite of this, the Division continued to certify payments to the contractor retaining only 15% as provided for by the contract. Various payments were made to the contractor by respondent in the amounts certified up to and including July 12, 1951, and

on that date the unpaid balance due under the contract amounted to \$63,285.86.

Prior to January 24, 1952, the Division had received notice of claims by subcontractors of the said Eiswirth Construction and Equipment Company for payments due for labor and materials furnished to the job in the aggregate amount of \$67,211.50 ; and, as of that date, respondent, acting by and through its Division, had full knowledge that the unpaid balance due under the contract being retained by respondent would be insufficient to pay all of such claims, if the same should be proven valid.

Claimant alleges on information and belief, and states the fact to be that the Eiswirth Construction and Equipment Company, the contractor, was on and after July 31, 1952 insolvent, and had been certified by the Secretary of State for involuntary dissolution.

A surety bond had been posted by the Continental Casualty Company under said contract. This was a performance bond executed by the contractor as principal, and the surety company as surety in favor of respondent, and by the terms thereof it was obligated to complete the job and settle all claims of record in the office of the Division. It appears that after July 31, 1952 the Division made claim against the surety company on said performance bond.

On or about August 25, 1952, the surety company notified respondent that it waived its option to complete the contract. It authorized respondent to cause the work to be completed, and to pay for such completion out of the balance remaining unpaid on said contract.

It further appears from the complaint filed herein that the surety company further notified respondent of its intentions regarding the claims of subcontractors as follows :

“As to the claims of unpaid suppliers, these are receiving our attention, and the surety will discharge its obligation to **such** claimants, in accordance with the laws and statutes pertaining thereto.”

In compliance with Chap. 82, Sec. 23, Ill. Rev. Stats. ; and, Chap. 29, Sec. 16, claimant did on or about September 17, 1952, i.e., within 180 days after the date of the last item of **work**, or the furnishing of the last item of materials, file in the office of the Director of the Department of Public Works and Buildings a verified notice or statement of his claim.

On or about October 21, 1952, respondent was notified in writing of the desire of claimant to comply with the statutes of the State of Illinois. Claimant called respondent's attention to the provisions of Chap. 29, Sec. 16, Ill. Rev. Stats., requiring all actions on the bonds of contractors with the State of Illinois to be brought within six months after the acceptance by the State of the building project or work, and requested respondent to advise claimant of such acceptance when, and if, the same should be made.

On or about October 15, 1952, the Attorney General of the State of Illinois advised the Director of the Department of Public Works and Buildings that the only amount, which could be subject to a lien in favor of the subcontractors of the Eiswirth Construction and Equipment Company, who had supplied labor or material to the job, was the unpaid balance due under the contract less the cost of completing the job, and advised the Director to do nothing with respect to the payment of the claims of such subcontractors until all of the work contemplated by the contract had been completed and paid for.

It appears from the complaint that the job was finally approved and accepted by respondent on or about

August 23, 1953, and that the unpaid balance due under the contract on that date amounted to **\$35,203.13**. The contractor, having completed the job, was paid in full.

Claimant alleges that he was without any source of knowledge or information concerning the status of the job from time to time, except such as was supplied to him by respondent acting by and through the aforesaid Division. This fact was known or ought to have been known by said Division.

The appropriation by the General Assembly for the payment of the contract was allowed to lapse on or about October 1, 1953, and no subsequent appropriation was made, so that funds would be available to pay the amount due claimant for labor and materials, which he supplied for the job.

Claimant contends that respondent, acting by and through said Division, negligently or wilfully committed one of more of the following acts :

a. Falsely represented to claimant that there was a sufficient balance then payable under the contract to pay claimant's claim in full.

b. Falsely represented to claimant that his claim could and would be paid without the necessity of his filing any legal action or suit of any kind.

c. Falsely represented to claimant that the only result of a suit by him to perfect a lien on the public funds payable under the contract would be to complicate and delay the payment of his claim.

d. Failed or refused to disclose the fact that the job was accepted on August 23, 1953, although repeatedly requested to do so by claimant.

e. Made statements and representations, which were calculated to and did lead claimant reasonably to believe

that the job had not been accepted on August 23, 1953, and that the job would not be accepted until claimant was notified.

As a direct and proximate result of the foregoing, claimant was induced to and did refrain from filing any suit either to perfect a lien on public funds under the contract, or to recover against the surety company on the Eiswirth Construction and Equipment Company's bond until after the respective periods, during which such action could have been brought, had expired.

Count II repeats and realleges the first twenty-one paragraphs of Count I, as though realleged as paragraphs 1 to 21 in Count II.

In this count claimant contends that, on or about September, 1952, and on or about July, 1953, claimant and respondent, acting by and through said Division, entered into an oral agreement under the terms of which claimant agreed to refrain from filing any suit or proceeding to perfect a lien upon the public funds payable under the contract; and, that respondent agreed, in consideration therefor, to inform claimant of the date of the acceptance of the job by respondent in a sufficient time to enable claimant to commence an action to recover against the surety company on the bond executed by the Eiswirth Construction and Equipment Company, the contractor.

It is further alleged that claimant has fully performed all acts and things required of him by said agreement.

Claimant is predicated this count upon a breach of contract.

The record in this case consists of the following:

Complaint
Departmental Report

Joint motion of claimant and respondent for leave to waive filing of briefs

Order of the Chief Justice granting the joint motion of claimant and respondent for leave to waive filing of briefs

Transcript of evidence

Commissioner's Report

4

A Departmental Report was filed and made a part of the evidence, and was accepted by the Commissioner, who heard this case. In the Departmental Report it is set forth that the Department was notified that the claimant was to do certain portions of the work as a subcontractor; that he furnished labor and materials and properly completed the project; that throughout the progress of the same claimant repeatedly advised the Division of Architecture and Engineering, Department of Public Works and Buildings, that the contractor, the Eiswirth Construction and Equipment Company, owed certain sums of money to claimant; and, that the records of the Division indicate that it was notified both in writing and by telephone communications. Claimant was notified of the insolvency of the contractor, and further that the surety company, as surety on the performance bond, would be called upon to complete the project. The Continental Casualty Company provided notice to claimant and others of their method of processing claims. However, due to a claim of technicality, and, even after being assured by the Continental Casualty Company and the Division of Architecture and Engineering, the Continental Casualty Company rejected claimant's claim.

The project was completed by claimant to the entire satisfaction of the State of Illinois, and was accepted by the State through the Division of Architecture and Engineering on or about August 23, 1953. It is the feeling of the Division of Architecture and Engineering that claimant has fulfilled his obligation to the State of Illi-

nois; that the same was done in good faith; and, that, claimant is entitled to payment.

At the hearing on January 28, 1959, the only witness testifying in this case was Henry W. Larson, claimant, who testified to all the material matters set forth in the complaint.

Respondent filed a Departmental Report only, and did not make any attempt to deny or resist the allowance of the claim. In fact, the Departmental Report indicates that claimant has performed his said contract satisfactorily, furnished the materials and labor set forth, and should recover for labor and materials furnished to respondent at the Anna State Hospital, Anna, Illinois.

An award is, therefore, made to claimant by this Court in the amount of \$12,067.35.

(No. 4827 — Claimant awarded \$176.36.)

CONTINENTAL OIL COMPANY, A CORPORATION, Claimant, vs.
STATE OF ILLINOIS, Respondent.

Opinion filed March 26, 1959.

SORLING, CATRON AND HARDIN, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation*. Where evidence showed that the only reason claim was not paid was due to the fact that prior to the time a statement was presented the appropriation lapsed, an award will be made.

FEARER, J.

On June 17, 1958, Continental Oil Company, A Corporation, claimant, filed a complaint in this Court for an award of \$176.36 for sales of merchandise during the period from April 18, 1957 to June 26, 1957, which merchandise was delivered to the Division of Highways, De-

partment of Public Works and Buildings, State of Illinois. Quantities and prices of such gasoline, motor lubricating oil, and other articles and services, so sold and purchased, and the respective dates of purchases are set forth in the exhibit attached to the complaint and made a part thereof by reference.

It is alleged that the claim in the amount of \$176.36 was presented to the Division of Highways, Department of Public Works and Buildings, on or about December 6, 1957. Said claim was supported by schedules Nos. 1088 in the amount of \$142.67, and 1089 in the amount of \$33.69, each of said schedules having the original invoices attached. A copy of said schedule No. 1088, together with the original invoices, was attached thereto, marked exhibit A and made a part of said complaint. A copy of schedule No. 1089, together with the original invoices, was attached to the complaint, and marked exhibit B; and, a copy of the recapitulation, marked exhibit C, was attached to the complaint and made a part thereof.

Claimant attached as exhibit D, which was also made a part of the complaint by reference, a letter, dated December 16, 1957, from V. L. Glover, Engineer of Administrative Services, Division of Highways of the State of Illinois, wherein it is set forth that the Division was unable to pay the claim because of the lapse of the biennial appropriation on September 30, 1957. It is further set forth in said exhibit that the Division of Highways recognizes that the invoices attached to the complaint covered purchases made by respondent and the Division of Highways.

This is a case where the reason for non-payment was that the appropriation had lapsed before the bills were presented. There is no question but what the goods were

delivered and were satisfactory. It was recognized by respondent, through the Division of Highways, that said claim should be paid.

It is, therefore, the order of this Court that an award be made to claimant, Continental Oil Company, A Corporation, in the amount of \$176.36.

(No. 4841—Claimant awarded \$718.70.)

STANDARD OIL COMPANY, INDIANA, INC., A CORPORATION,
Claimant, vs. STATE OF ILLINOIS, Respondent.

opinion filed *March 26, 1959.*

STANDARD OIL COMPANY, INDIANA, Claimant, pro se.

LATHAM CASTLE, Attorney General; LESTER SLOTT,
Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* Where evidence showed that the only reason claim was not paid was due to the fact that prior to the time a statement was presented the appropriation lapsed, an award will be made.

FEARER, J.

On October 3, 1958, Standard Oil Company, An Indiana Corporation, filed a complaint in this Court seeking an award of \$718.70 for sales of gasoline, oils, greases, tires, tubes, services, etc., which were made during the years of 1956 and 1957, said sales being made to various departments of the State of Illinois by the Standard Oil Company and its dealers. Charges for said merchandise were assigned by various dealers to claimant for collection.

Attached to the complaint filed herein are exhibits covering the sales of the merchandise.

The Commissioner to whom this case was assigned interrogated Daniel H. Simpson, Jr., who identified the exhibits, and testified as to the delivery of the merchandise to the various departments of respondent.

It was further testified to that the bills were submitted to the various State agencies of respondent for payment, but that payment was denied for the reason that the appropriations made to the several departments and commissions had lapsed as of September 30, 1957, which was before the bills referred to were submitted to them.

The State offered in evidence as its exhibit No. 1 a Departmental Report of the Division of Highways by Earl McK. Guy, Engineer of Claims, which corroborates the testimony of Mr. Simpson. In the Departmental Report, Mr. McK. Guy recognizes the delivery of the merchandise, the reasonableness of the prices, and the sufficiency of the kinds and grades of products, which he stated were consistent with the requirements of the purchase orders given to the various State departments to whom the merchandise was delivered.

It is further set forth in the Departmental Report that the appropriations made to the several offices and commissioiis by the 69th General Assembly for the purchase of the merchandise lapsed as of September 30, 1957, and that claimant submitted its schedules for vouchering and payment at such a late date, that they could not be vouchered and paid for in apt time.

There is no question but what each of the respective offices, departments and commissions had a sufficient balance remaining in its appropriation for the purchase of the merchandise, and, had claimant submitted its bills at the proper time, they could have and would have been paid in the regular course of business.

This Court has had numerous occasions to pass on similar situations, and have in each instance allowed the claim where the bills were reasonable and the merchan-

dise satisfactory, where the appropriation for that bien-nium had lapsed before the bills were submitted, and where there was sufficient money on hand at the time the merchandise was furnished.

An award is, therefore, hereby made by this Court to claimant, Standard Oil Company, An Indiana Corporation, in the amount of **\$718.70**.

(No. 4763—Claim denied.)

ELIZABETH COLE, FRANCIS BIGLER AND ADELIA BIGLER, PETER GRANT AND BERTHA GRANT, SAM FOSTER AND IRMA FOSTER, MAX CASKEY AND SHIRLEY CASKEY, DONALD COLE AND PEARL V. COLE, Claimants, **vs.** STATE OF ILLINOIS, Respondent.

Opinion filed April 17, 1959.

STANLEY W. CRUTCHER AND ELMO E. KOOS, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—consequential damages. Where owners dedicate property for public use in connection with a public improvement, the law conclusively presumes that the consideration for the dedication is based not only on the value of the land dedicated, but also on any damages sustained to contiguous land of the owner by reason of the improvement.

SAME—same. Evidence showed that claimants had signed deeds of dedication for a freeway, which precluded them from thereafter claiming damage; because the level of the highway was not as they had understood.

SAME—same—same. Where no fraud is alleged in securing deeds, which are unambiguous, it will be conclusively presumed that claimants transferred all rights to their property, past, present and future.

TOLSON, C. J.

On February 28, 1957, claimants filed a joint claim against respondent for consequential damages caused by the reconstruction of U. S. Route No. 24.

In 1951 this area was declared a freeway, and plans were developed to convert U. S. Route No. 24 into a four-

lane highway. During the year of 1953 the Highway Department secured deeds of dedication from the several property owners, and the work was commenced in March of 1954 and completed in November of 1955.

The deeds in question bore the title of "Dedication of Right of Way for a Freeway". The concluding paragraph was as follows :

"And the grantors further, as a part of this dedication, on behalf of himself, his heirs, executors, administrators and assigns, does hereby release, quit-claim and extinguish any and all rights or easements of access and crossing, under which the tract of land herein conveyed and dedicated might otherwise be servient to abutting lands of the grantor."

Two of the deeds in question, executed by the Biglers and Grants, specifically released access, light and view.

Claimants' theory of this case is that respondent did not accurately portray the height of the new road when they secured their deeds, and, had claimants fully understood the nature of their loss, they would have required the State to condemn, so that a jury could assess proper damages for their loss of access, air, light and view. Claimants, therefore, conclude that, the consequential damage was not paid for in the first instance, and that they still have a cause of action, for which this Court should provide a remedy by an award.

The complaint, in substance, alleges that the agents of respondent represented that the new road would be reconstructed substantially at the same level, but, in fact, was elevated from six to ten feet. As a result, claimants lost access, light, air and view; the drainage was inadequate, which caused stagnant pools and mosquitoes; odors from septic tanks were present; and, the State did not build a sidewalk, as promised.

It is significant to note that the complaint does not allege a false representation, knowingly made, to induce claimants to sign deeds to their substantial damage.

At the very outset, this Court is confronted by the parol evidence rule. A deed, which is unambiguous, and which has a settled meaning in law, cannot be changed or added to by parol evidence. *Morton vs. Babb*, 251 Ill. 488.

The Commissioner, who heard this case, might well have refused to entertain testimony from either side, which would vary or contradict the plain language of the deed. However, the testimony fails to strengthen claimants' case. It discloses that claimants were given copies of the deeds to examine for several days before execution; that one or more of them had advice of counsel; that plans and specifications were available at the time of the discussions; and, though claimants undoubtedly could not interpret them, at least they were, afforded the opportunity to obtain expert advice before they executed their deeds.

The complaint does not allege nor does the evidence support the element of false representation, which would open the door to testimony to vary or contradict the deeds. Clearly all parties knew they were giving up their rights of access, for it was so spelled out in the deeds. The consideration paid to each was substantial, ranging from \$1,600.00 to \$1,800.00.

Rights of air, light and view were specifically released in two of the deeds. As to the rights of the other claimants in this regard, even though not specifically released, the law in Illinois appears to be as follows :

"No easement of light and air can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed." 29 L.R.A. 582; *Baird vs. Hanna*, 328 Ill. 436.

The claimant grantors in the other deeds, having failed to reserve their rights in light, air and view, cannot establish them in this proceeding.

Notwithstanding the above rule of law, counsel for claimants urge that, had they had their day in court, the losses that they allege would have been compensated for as consequential damages.

A case, similar in many respects to the present claim, was before this Court in 1952, namely, *Cutshall, Et Al? vs. State of Illinois*, 21 C.C.R. 150. Claimants were the owners of certain land, and the State of Illinois, by condemnation, secured a portion of the land to construct a subway under the Illinois Central Railroad. Under the decree of condemnation claimants were paid the sum of \$2,742.00.

Thereafter, claimants filed their claim in this Court seeking damages to land not taken, and alleged that, since the construction of the subway and storm sewer, a well on the place failed to supply adequate water, and that a newly drilled well produced contaminated water. This Court denied the claim, and stated that a decree in condemnation includes damages both to lands taken and lands not taken, and includes all damages, past, present and future.

The above rule was established in the case of C., *R. I. and P. Ry. Co. vs. Smith*, 111 Ill. 363. F. Burcky, the then owner of Lot 11, conveyed a 100 foot right of way to the railroad. Thereafter Lot 11 was subdivided, and Smith became the owner of the tract next to the railroad right of way. Smith alleges that the railroad increased the number of tracks, that the trains were cracking the wall of his building, and that this property was showered with soot and ashes. •

On appeal, the judgment was reversed. "The rule is that the appraisalment of damages in a case of condemnation embraces all past, present and future damages,

which the improvements may thereafter reasonably produce.” In addition thereto, the court said at page 371:

“It follows that, had the railroad company condemned this right of way as against Burcky, who was the owner of the whole tract, no recovery **could** have been had for the damages here sued for. They would have been included in the assessment of damages made on the condemnation, and whether in fact included or not they would be conclusively presumed to have been included. The same result, we conceive, follows from Burcky’s voluntary conveyance of the right of way. It is to be presumed that the contingent damages to the residue of the lot, which might arise from the prudent operation of the railroad, were taken into account in fixing the price. (See *Norris vs. Vermont Central R. R. Co.*, 28 Vt. 99, and *Conwell vs. Railroad Co.*, 81 Ill. 233.)”

In the light of this rule, it would appear that a deed of dedication is all inclusive, and of the same effect as a condemnation proceeding.

In the case of *Longden vs. State of Illinois*, 12 C.C.R. 129, a complaint for consequential damages was dismissed on motion, and the Court said at page 131:

“Where owners dedicate property for public use in connection with public improvement, the law conclusively presumes that the consideration for the dedication is based not only on the value of the land dedicated, but also on any damages sustained to contiguous land of the owner by reason of the improvement. *Lepski vs. State of Illinois*, 10 C.C.R. 170; *Baber vs. State of Illinois*, 9 C.C.R. 115; *Siekman vs. State of Illinois*, 10 C.C.R. 286.”

Claimant, Elizabeth Cole, has introduced in evidence a permit, dated October 22, 1947, which was issued by the Division of Highways, authorizing her to construct and maintain two 24 inch entrance culverts to her lands. She contends that this permit is still in force notwithstanding her deed, which expressly extinguishes her rights of access to the highway.

Since a valuable consideration was paid by the State for the release of the right of access as part of this transaction, it necessarily follows that this contention is untenable. It may further be said that a permit is nothing more than an allowance or a license. It establishes no rights.

Counsel has submitted cases from other jurisdictions, i.e., *Dallas County vs. Barr*, 231 S.W. 453; *Parker vs. State Highway Commissioner*, 162 So. 162, wherein the grade of the road was either elevated or lowered so that the parties were deprived of rights of ingress or egress, and damages were allowed.

Illinois courts have likewise granted damages to parties where railroads have elevated tracks, built subways, etc., and thereby destroyed their existing rights of ingress and egress, but those cases are not similar to the case at bar.

In the instant case, claimants were paid a valuable consideration to extinguish their rights of access to the highway. The exact height of the grade may not have been too clear, but it is doubtful that the parties were unaware of the fact that the grade would be raised. This was an all inclusive transaction.

Respondent argues that the acquisition of a right of way piecemeal in fifty feet tracts is a time consuming matter, and that it is virtually impossible to explain the engineering problems in detail to all concerned. It further argues that the policy of paying for deeds of dedication would be of little value, if they were thereafter obliged to pay for consequential damages.

Since this Court does not find any fraud in the procurement of the deeds, it must follow established law by holding that the payment for the deed includes past, present and future damages.

An award is, therefore, denied.

(No. 4232—Claimant awarded \$551.80.)

KATHRYN A. DOWNEY, Claimant, **vs. STATE OF ILLINOIS**,
Respondent.

Opinion filed July 24, 1958.

Petition of claimant for rehearing denied May 12, 1959.

ENSEL, MARTIN, JONES AND BLANCHARD, Attorneys for
Claimant.

LATHAM CASTLE, Attorney General; **C. ARTHUR NEBEL**,
Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*supplemental award*. Where Court retained jurisdiction to make supplemental awards for medical expenses and transportation, upon the presentation of proof of said expenses an award will be made.

DAMAGES—*burden of proof*. Claimant failed to show by a preponderance of the evidence that loss of salary was due to injury received in the course of her employment.

TOLSON, C. J.

On July 9, 1956, claimant filed a supplemental complaint for reimbursement for medical expenses and transportation; and, in addition thereto, filed a claim for loss of salary.

It appears from the record that this Court made an award on March 9, 1951, and again on April 21, 1955, and, in each instance, reserved jurisdiction for such further orders as might be necessary. The complaint originated by reason of an injury to claimant on October 21, 1948, while an employee of the Secretary of State.

The bill of particulars, attached to the complaint, sets forth the following items :

1. Due Springfield Clinic Pharmacy, 1025 South Seventh Street, Springfield, Illinois, for medicines from March 5, 1954 through May 28, 1956.....	\$ 128.20
2. Due Springfield Rural Urban Clinic, 1025 South Seventh Street, Springfield, Illinois, for medical care, treatment, laboratory tests and x-rays from April 5, 1955 through June 16, 1956.....	157.00
3. Additional medicines	39.80

4. Transportation charges to and from Springfield Rural Urban Clinic in 1955.....	24.40
5. Loss of salary due from the State of Illinois withheld because of inability to work because of injuries	\$1,458.56

On December 9, 1957, the complaint was amended, and the bill of particulars was changed to read as follows :

1. Due Springfield Clinic Pharmacy, 1025 South Seventh Street, Springfield, Illinois, for medicines from last hearing herein to date	\$ 294.90
2. Due Springfield Rural Urban Clinic, 1025 South Seventh Street, Springfield, Illinois, for medical care, treatment, laboratory tests and x-rays from date of last hearing to date.....	200.00
3. Additional medicines	32.50
4. Transportation charges to and from Springfield Rural Urban Clinic	24.40
5. Loss of salary because of inability to work because of injuries	\$3,566.89

The transcript of evidence and exhibits support, the claim as to the first four items of the bill of particulars with a reasonable degree of proof. The claim for loss of salary, item 5, is found on pages 9 and 10 of the transcript.

"Q. Miss Downey, I assume that 'the State of Illinois would have the amounts, which were paid to you for the period from February 15, 1955 until August 15, 1955, and I'll show you a copy of the Departmental Report, which has been admitted into evidence by stipulation, and I will call your attention to paragraph 7 of that Departmental Report which itemizes the amounts that were paid to you for the months of March, April, May, June, July and August of 1955. I will ask you to examine that paragraph, and state whether or not you believe the amounts shown there are correct.

A. They don't have in there the amount that I worked in February when they informed me, and I didn't receive a check at the end of February.

Q. Then except for the month of February, which you might dispute, would you be willing to assume that that is correct?

A. I would say approximately. I am sorry that I didn't keep track of my checks. I should have.

Q. Now, why is it that during part of 1955 you did not work full time?

A. I just wasn't able physically.

Q. When you say you were not able physically?

A. Due to the injury to my back.

Q. And that is the same injury that is involved in this matter here?

A. 1948.

Q. Now when did you next become employed?

A. October 21, 1956.

Q. And during the period from August 15, 1955 to October 21, 1956 why didn't you work?

A. Because I was advised not to—because my illness of this back injury.

Q. And who advised you?

A. Well, the doctor told me that it would be better for me to have more rest.

Q. What doctor?

A. Dr. Manson. I spent about 16 hours in bed most of that time.

Q. On October 21, 1956 by whom were you employed?

A. Illinois Commerce Commission.”

It is to be noted that the two previous awards related to reimbursement for medical and transportation expenses. This complaint, for the first time, seeks an award for loss of salary, and, while there is no dispute that the injury was received in the course of her employment, the question of the extent of her injuries is now presented for consideration.

The following appears in Illinois Workmen's Compensation, Angerstein, Sec. 515:

“An award of the Industrial Commission or of a circuit court may not be based upon guess, surmise or conjecture, or even upon a choice between one of two views equally compatible with the evidence. Awards may be based only upon facts established by the evidence or upon inferences that may reasonably be drawn from facts established by the evidence. Liability under the Act cannot rest upon imagination, speculation, or conjecture, but must be based upon facts established by a preponderance of the evidence. The rules respecting the admissibility of evidence and the burden of proof are the same as prevails in a common law action for personal injury.”

This Court has at all times required a claimant to prove his case by a preponderance of the evidence. This complaint is not supported by medical testimony, x-rays or other supporting matters, and falls far short of proving the extent of her injuries and inability to do any kind of work for 14 months.

As to item 5, the Court, therefore, finds that the claim is not proven in a manner, as required by law.

Awards are, therefore, made to claimant as follows:

1. Springfield Clinic Pharmacy, 1025 South Seventh Street, Springfield, Illinois, for medicines from last hearing herein to date.	\$ 294.90
2. Springfield Rural Urban Clinic, 1025 South Seventh Street, Springfield, Illinois, for medical care, treatment, laboratory tests and x-rays from date of last hearing to date.....	200.00
3. Additional medicines	32.50
4. Transportation charges to and from Springfield Rural Urban Clinic	24.40

An award is also made to Frances Paul in the amount of \$33.90 for court reporting services.

This award is made subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State Employees".

(No. 4699—Claim denied.)

WILLIAM S. AUSTIN, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed May 12, 1959.

LANSDEN AND LANSDEN, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL,
Assistant Attorney General, for Respondent.

JURISDICTION—*Sec. 22 of the Court of Claims Act.* Evidence failed to show claimant suffered from any "other disabilities" so as to toll the statute of limitations for bringing suit in the Court of Claims.

TOLSON, C. J.

On November 28, 1955, claimant filed his complaint seeking an award for injuries, which he sustained while an inmate at the Illinois State Penitentiary, Menard, Illinois.

From the evidence, it appears that on April 3, 1952 claimant was playing softball during an authorized recreation period. In an attempt to slide into second base he collided with the second baseman, and suffered a fracture through the articular surface head of the left radius.

The gist of the complaint is to the effect that the attending doctor made a "slip-shod" diagnosis, and, instead of placing the arm in a cast, diagnosed the injury as a sprain, and ordered claimant to carry it in a sling. As a result of improper treatment, claimant alleges that he now has a pronounced limitation of motion.

Respondent, for no apparent reason, failed to file a motion to strike the complaint on the grounds that it was barred on its face by the statute of limitations. Claimant alleges that the facts of this case show that he was suffering from "other disabilities", so that he should escape the bar of the statute.

At the outset, we must consider Section 22 of the Court of Claims Act:

"Every claim, other than a claim arising out of a contract or a claim arising under subsection C of Section 8 of this Act, cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and person; under other disability at the time the claim accrues two years from the time the disability ceases."

The precise point was considered by the Court in the case of *Atkinson vs. State of Illinois*, 21 C.C.R. 429:

"On February 19, 1953, claimant, Henry Atkinson, filed his complaint in this Court seeking to recover an award for injuries sustained by him on September 30, 1949, allegedly due to the negligence of respondent, while claimant was an Inmate of the Illinois State Penitentiary, Stateville Branch.

Section 22 of the present Court of Claims Act, Ill. Rev. Stats., 1949, Chap. 37, Sec. 439.22, provides that the filing of a claim, unless sooner barred, within two years of its accrual is jurisdictional 'saving to infants, idiots, lunatics, insane persons, and persons under other disability at the time the claim accrues two years from the time the disability ceases'. *Weber vs. State of Illinois*, 19 C.C.R. 33, and *Auto Electric Co. vs. State of Illinois*, 20 C.C.R. 198.

Although respondent has filed no motion pointing out that the complaint has been filed too late, since jurisdiction of this Court is involved, and the question of the jurisdiction of this Court may be raised at any time, even by the Court on its own motion, we, therefore, must determine whether we can hear this case. *Flynn vs. State of Illinois*, 19 C.C.R.184.

The complaint, on its face, shows that claimant is not now, and has not, since his claim accrued, been under any disability, which would toll the running of time against him.

It has always been the rule in this Court that confinement in the penitentiary is not such a disability as would toll the running of the statute. *McElyea vs. State of Illinois*, 7 C.C.R. 69, and *Robertson vs. State of Illinois*, 19 C.C.R. 146. The latter case contains a complete discussion of the problem involved herein, and in that case the claim was dismissed, because the former convict therein involved waited too long to file his case.

In view of the foregoing, claimant has filed his complaint too late, and this Court is without jurisdiction to hear it.

The case is dismissed."

In an effort to avoid the rule in the *Atkinson* case, claimant alleges that "other disabilities" prevented him from filing his claim on time, and states that in the summer of 1954 a Veterans' Service Officer was asked to supply an attorney, but that he suggested claimant wait until his discharge to institute such action.

He further alleges that his sister made an effort to locate an attorney without success, and, finally, that he feared any claim filed by him would affect his chance of parole or discharge.

Notwithstanding the above allegations, claimant, while a prisoner, filed his complaint "pro se" on November 28, 1955, and, if he elected to file his complaint while a prisoner, it should have been filed on time.

For the reason that the Court is without jurisdiction to hear the case, an award is, therefore, denied.

(No. 4732—Claimants awarded \$500.00.)

**RUDOLPH DREIKURS AND SADIE DREIKURS, Claimants, vs.
STATE OF ILLINOIS, Respondent.**

Opinion filed March 26, 1959.

Petition of claimants for rehearing denied May 12, 1959.

ELMER GERTZ, Attorney for Claimants.

LATHAM CASTLE, Attorney General; RICHARD F. SIMAN, Assistant Attorney General, for Respondent.

STATE PARKS, FAIRGROUNDS, MEMORIALS AND INSTITUTIONS—*unavoidable* accident. Where evidence showed that neither respondent nor claimants **were** negligent, the fall in snow was an unavoidable accident.

NEGLIGENCE—*assumed risk*. Persons living in the northern portion of Illinois assume the risk of being involved in accidents caused by sleet, ice and snow, and thus may be injured through no fault of their own.

TOLSON, C. J.

Dr. Rudolph Dreikurs and Sadie Dreikurs, his wife, filed their claim for injuries received by Sadie Dreikurs while attending a meeting at the Galesburg State Research Hospital, Galesburg, Illinois.

The facts of the case are as follows:

Dr. Rudolph Dreikurs, a psychiatrist of Chicago, Illinois, had given lectures at various State institutions, and was invited by Dr. Thomas T. Turlentes, Assistant Superintendent, to appear at Galesburg for this purpose. He was paid a fee of \$50.00 plus his travel expense.

When trips of this nature were scheduled, the Chicago Office of the Department of Welfare would make the necessary travel reservations, and, in this instance, the secretary to Dr. Lee, Administrative Assistant of the Department, was advised by Dr. Dreikurs that his wife would accompany him. Dr. Dreikurs, in his testimony, made it clear that he paid her travel expense, and did not bill the State.

Sadie Dreikurs, in her testimony, identified herself as a trained social worker in psychology. She stated that she was employed by several welfare agencies in Cook County, and that she was her husband's secretary, and assisted him in taking notes and preparing publications.

On January 19, 1956, Dr. Dreikurs and his wife went to Galesburg. It had snowed on January 18th, and snow fell intermittently on the 19th. Dr. Turlentes met them at the railroad station and drove them back to the institution. On the return, he left the car in a paved

parking lot adjacent to the Administration Building, and the three occupants started walking towards it.

While walking, Sadie Dreikurs fell and suffered a bimalleolar fracture of the right ankle. Thereafter she was hospitalized. There is no dispute but what she suffered great pain, and incurred considerable expenses for hospital and medical care.

In addition to the foregoing, while being transported on a stretcher to the train, an attendant from the hospital slammed the door of the car on the large toe of her injured foot, which caused shock and further aggravation.

The amended complaint charges in substance that respondent was negligent in failing to have its walks and driveways in a clean and satisfactory condition for walking; in failing to unload the occupants at the building entrance, rather than the parking lot, which was a short distance away; and, finally, in failing to use due care when transporting Mrs. Dreikurs on a stretcher.

The evidence further discloses that a heavy snow had fallen in the area on the 18th, and that the parking lot had been plowed later in the day. On the 19th, the snow removal equipment was being used in other portions of the grounds to clear the walks and driveways.

Our inquiry is first directed to the legal status of Sadie Dreikurs at the time and place in question. The Department of Public Welfare was aware that Mrs. Dreikurs would accompany her husband, as they had made a train reservation for her. Mrs. Dreikurs, as an invitee, was, therefore, entitled to reasonable or ordinary care on the part of respondent to maintain its premises in a reasonably safe condition. This degree of care does not impose the liability of an insurer as against any accidents that may occur, but only requires that the own-

ers of premises use reasonable care. *Murray vs. Bedell Co.*, 256 Ill. App. 247.

Applying this test to the facts at hand, we find that respondent had removed the snow from the parking lot on the 18th, and was using its equipment and man power in other areas of the grounds at the time of the accident. It cannot be argued that respondent should have multiple pieces of equipment on hand at all times so that all areas could be cleaned simultaneously, as this is an unreasonable demand.

As to the first charge of negligence, i.e., failure to remove snow, we find that respondent had done and was doing all that a reasonable person could do under the circumstances of this case.

As to the charge of negligence, i.e., failure to unload the occupants in the driveway rather than the parking lot, we feel that the evidence does not support the charge.

As stated above, the parking lot was adjacent to the Administration Building. It was paved, and had been established for this particular convenience. It had been plowed once so that it was in a usable condition, as Mrs. Dreikurs testified at page 32 of the transcript:

“Q. Were there other cars parked in this parking area?”

A. I think three or four cars.”

There was nothing unusual or unreasonable in the act of Dr. Turlentes in driving directly to the parking lot, for the evidence discloses that both Dr. Turlentes and Dr. Dreikurs were able to walk upon the snow on the parking lot without the slightest difficulty.

Respondent argues that claimant was guilty of contributory negligence, and, in this regard, we feel the charge is not supported by the evidence. She wore galoshes. She had no way of knowing whether there was

residual ice underneath the snow, which had accumulated since the lot had been plowed. She acted as anyone else would have under similar circumstances.

Since the evidence does not support the charge of negligence or contributory negligence as to the first two counts, the only way to account for the misadventure is to accept it as an unfortunate accident.

The word "accident" is difficult to define. In its most commonly accepted meaning, the word denotes an event that takes place without one's foresight or expectation. 1 C.J. 319.

An accident, unavoidable under the circumstances, was more precisely defined in the case of *Hutchcraft vs. Travelers Insurance Company*, 87 Ky. 300, 85 W. 570:

"Accident to a person by his own agency, as where one is walking or running and accidentally falls and hurts himself. Here he falls by reason of his agency in walking or running, but he did not intend to fall; he did not foresee that he would fall in time to avoid it. The fall was, therefore, accidental."

Our Illinois Courts have defined the term "accident" as follows:

"The term 'accident' is used with different meanings, including unforeseen events occurring without human agency, but, as connected with conduct of persons, means an unforeseen event for which some one may or may not be responsible. *Wall vs. Greene*, 321 Ill. App. 161."

It is common knowledge that the northern half of Illinois is subject to miserable and many times dangerous conditions for four or five months of the year. Sleet, ice and snow make walking or driving a genuine hazard. In spite of reasonable efforts made to remove these hazards, many people are injured through no fault of their own. All who elect to live and work in this area, usually because economic conditions are better, assume a risk that does not exist in other parts of our country.

Such a truism is small comfort to one, who has undergone pain and financial loss, but our law does not

assess a penalty against anyone, where the injury complained of is the result of an accident.

As to the third charge of negligence, i.e., slamming the car door on claimant, we believe the charge is sustained.

It is virtually impossible to separate the evidence, and determine the loss occasioned by this act. Hence, the Court must be more or less arbitrary, and conclude that the pain and suffering produced a loss of \$500.00.

An award is, therefore, denied as to Rudolph Dreikurs, and an award is made to Sadie Dreikurs in the amount of \$500.00.

SUPPLEMENTAL OPINION

On April 23, 1959, claimant filed a petition for rehearing, and alleges that the Court found negligence under the third charge, but arbitrarily only allowed the sum of \$500.00 for pain and suffering.

The balance of the petition sets out the medical expenses incurred by claimant, and reported cases where substantial damages were allowed for the fracture of a leg.

In its original decision, the Court found that the fracture of the leg was the result of an accident without negligence or contributory negligence of either party. The only element of negligence found by the Court concerned the slamming of the car door against claimant's toe after she had received her injury. The evidence further disclosed extreme pain and nausea, but no effort was made by claimant to show that this injury aggravated the fractured leg, nor was there any evidence offered to show that the medical expenses were increased by it.

The substantial injury was the fracture to the leg, rather than the aggravated pain caused by the slamming of the door, and the Court, therefore, limited the award to the particular negligence.

For the reason above stated, the petition for rehearing is denied.

(No. 4743—Claimant awarded \$1,500.00.)

LESLIE G. MORRIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1959.

LANSDEN AND LANSDEN, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*personal* injuries. Evidence showed that claimant was assigned to work under unsafe conditions, which would have violated the Health and Safety Act if it was applicable to the State, entitling claimant to an award.

SAME—*duty* to safeguard prisoners *in work* assignments. State is bound to the same standards, as it requires of others under the Health and Safety Act, to protect persons assigned to work with tools covered by the Act.

TOLSON, C. J.

Claimant, Leslie G. Morris, filed his complaint on November 14, 1957 seeking damages for the loss of his right ring finger, while an inmate of the Illinois State Penitentiary, Menard, Illinois.

Claimant was assigned to the woodworking shop, and was engaged in making an officer's club on a machine known as a jointer. In pushing the wood through the machine, his hand slipped into the blades, and he suffered a traumatic amputation of the tip of his right fourth finger.

This machine has three cutting blades that revolve at a high speed, and, on the date in question, was not equipped with a safety device for the protection of the operator. It appears from the evidence that the machine

at one time had a safety device, which would have prevented the operator from coming into contact with the blades, but for some reason it had been removed.

We have previously held that a convict can maintain an action in this Court, while in such a status.

McElyea vs. State of Illinois, 7 C.C.R.69

Moore vs. State of Illinois, 21 C.C.R.282

This Court has also held that a convict is not an employee of the State within the meaning of the Workmen's Compensation Act, *Tiller vs. State of Illinois*, 4 C.C.R. 243; nor can he maintain an action for a violation of the Health and Safety Act, *Moore vs. State of Illinois*, 21 C.C.R. 282.

However, if it appears from the evidence that claimant was assigned to work under unsafe conditions, was not guilty of contributory negligence, and was injured, respondent would be guilty of negligence.

This Court made reference to the Health and Safety Act in the case of *Moore vs. State of Illinois*, and suggested that, if the Health and Safety Act required hoppers on a food grinder, this was an express recognition by the State that food grinders should be equipped with hoppers to render them safe.

The Health and Safety Act makes specific mention of jointers or buzz planers, and requires that all exposed parts of the cutting head shall be guarded. It is difficult for this Court to justify two standards of conduct by the State, one for workers outside prison walls and another for inmates.

The Court, therefore, finds that respondent was negligent in not providing safe equipment, and that claimant was free from contributory negligence.

An award is, therefore, made to claimant in the amount of \$1,500.00.

(No. 4760—Claimant awarded \$150.85.)

ARTHUR MAYES, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1959.

EPTON, SCOTT, McCARTHY AND EPTON, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; RICHARD F. SIMAN, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligent maintenance of manhole cover*. Evidence showed that the State was negligent in the maintenance of manhole cover, which became dislodged on highway and caused damage to claimant's automobile.

NEGLIGENCE—*constructive notice*. State had constructive notice of condition of manhole where highway was heavily traveled, and there were large amounts of water present, which could dislodge the cover, if not properly secured in place.

FEARER, J.

Claimant filed his complaint in this Court on February 4, 1957 for property damage to his automobile, which was sustained on August 12, 1956 while driving on Edens Highway in the County of Cook and State of Illinois. The amount of damages claimed is the sum of \$150.85.

Respondent did not file an answer, and, therefore, a general traverse of the allegations of the complaint will be considered.

A joint motion of claimant and respondent asking leave to waive the filing of briefs was granted. The case was heard by Commissioner George W. Presbrey, and his report has been filed herein.

The only witness testifying in this case was claimant, Arthur Mayes, who stated that on the 12th of August, 1956, between 9:30 and 10:00 P. M., he owned a 1953 Cadillac, which he was driving in a southerly direction on Edens Highway in Cook County, Illinois. Near Touhy Avenue it had been raining very hard, and he was traveling at a speed of about five or six miles an

hour approximately 25 feet behind a car proceeding; immediately in front of him. As he was driving behind the car in front of him, he noticed it hit something, which appeared to be a bump or depression in the road, and immediately thereafter a manhole cover rolled in the direction of his automobile and into the front portion near the bumper of his automobile. In getting out of his automobile he noticed that the manhole cover was loose, and had left the manhole upon being struck by the car immediately preceding him. He testified that, in his opinion, the manhole cover was at least 35 inches in diameter.

Claimant testified as to the damages and costs of repair, which were set forth in claimant's exhibit No. 1, which was admitted in evidence, and showed a total charge of \$150.85.

It appears from the record that there was no claim made on his insurance company, nor did the insurance company pay him any portion of this loss, less the deductible portion. Therefore, it is his claim, and there is no subrogation claim of any insurance company involved.

The complaint charges as the proximate causes of the accident :

1. Negligence of respondent's employees in failing to warn the traveling public on Edens Highway, at or about the intersection of Touhy Avenue, of the open or loose manhole.

2. Negligence of respondent's employees in so placing a cover upon the manhole that it became loose, and was propelled against claimant's automobile.

3. Negligence of respondent in permitting the existence of an open manhole on a public thoroughfare.

This Court had occasion to pass on a similar situation involving a manhole cover in the case of *N. B. Cou-*

shot vs. *State of Illinois*, 21 C.C.R. 157. The only difference in the two cases is that in the present case the manhole cover was struck by another automobile, which caused it to be propelled against claimant's automobile.

In that case the Court held that there could be no question but what it was the duty of the State in maintaining manhole covers to see to it that they would not be dangerous to persons lawfully using the highways, and driving their automobiles over them. From the evidence, which is also true in the present case, it could not be disputed that the State had constructive notice of the condition of the manhole cover for a period of time, so as to charge the State with negligence in failing to properly maintain it.

There is no question in this case but what Edens Highway was under the jurisdiction of respondent, and that it was the duty of respondent to see that it was maintained in a reasonably safe state of repair, particularly in view of the facts and circumstances in this case.

We make this statement knowing that the State is not an insurer of all persons, who drive upon its highways. But, in cases where there is a defect, which was either known or could have been ascertained by reasonable inspection, and, which would cause damages to persons and property upon said highway, particularly under the conditions in this case where there was a large amount of water, and a cover was loosely placed over the manhole, the State should have been aware of the fact that the water and traffic on said highway might cause the cover to become disengaged from the manhole, and result in damages to automobiles and the people riding therein.

The only conclusion that we can draw from the evidence offered in this case is that respondent's employees

were negligent in the maintenance of the manhole cover, especially under these circumstances where cars **were** traveling across it, and particularly because of the existence of the large amount of water, which could flow under or around the cover and disengage it. In our opinion, the proximate cause of the accident resulting in damages to claimant was respondent's failure to properly secure the manhole cover in its place, so that it could not become disengaged.

An award is hereby made by this Court to claimant, Arthur Mayes, in the amount of \$150.85.

(No. 4778—Claim denied.)

DUKE BOWDEN, Claimant, **vs.** STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1959.

MURPHY AND HEIMDAL, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; SAMUEL J. DOY, Assistant Attorney General, for Respondent.

NEGLIGENCE—burden of proof. Evidence failed to show that a negligent act of respondent caused claimant's injury, which occurred while he was helping to assemble a desk in the office of the Illinois State Employment Service.

WHAM, J.

This is an action to recover \$7,500.00 in damages for personal injuries sustained by claimant while assembling a desk in the office of the Illinois State Employment Service, Aurora, Illinois.

The evidence regarding the occurrence is conflicting on certain material points. However, it will not be necessary to consider the conflicts, since the evidence in its most favorable light from the standpoint of claimant precludes a recovery.

Claimant testified that, while he was awaiting assign-

ment to a “spot job” in the employment office, a steel desk was delivered. Roy Brown, a State employee, according to claimant, requested claimant and two other applicants to help carry the desk from the delivery truck into the office, which they did.

The desk was partially disassembled, and claimant and the two other men commenced assembling it. They had difficulty in joining the legs to the desk, and one of the men, Paul White, according to claimant, jumped onto the top of the desk and attempted to force the top down onto the legs. He testified that, approximately five minutes after White got off of the desk top, the top suddenly slipped into place mashing one-third of the distal phalanx of his left middle finger between the underside of the desk top and the point at which the legs fit into the top. Claimant further testified that, at the time his finger was injured, he was the only person holding on to the desk, that no one was sitting on the desk top when it came down, that no one was applying weight to the top of the desk, nor was anyone jiggling the desk at that time. He testified that he himself worked on the desk for approximately five minutes after Paul White had quit working on it, and was trying to bring the top down onto the legs when it suddenly slipped into place catching his finger.

No evidence was offered that the desk was faulty, or that respondent had any more reason to foresee this occurrence than did claimant.

Claimant contends that respondent was guilty of negligence in allowing White to jump onto the desk causing injury to claimant. It is obvious from claimant's own testimony that the injury was not caused by White's jumping onto the top of the desk.

There is no evidence that respondent negligently

caused this injury, and, inasmuch as respondent is not an insurer of claimant's safety, there is no basis under the law upon which this claim can be allowed.

We must, therefore, deny the claim.

(No. 4783—Claimant awarded \$484.46.)

ELEVATOR MANUFACTURING COMPANY OF AMERICA, A CORPORATION, Claimant, **vs.** STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1959.

GANN, SECORD, STEAD AND MCINTOSH, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

CONTRACTS—*emergency repairs*. Where work is authorized for emergency repairs, claimant is entitled to the reasonable value of his services.

FEARER, J.

Claimant, Elevator Manufacturing Company of America, A Corporation, filed its complaint in this Court on July 15, 1957, wherein it is alleged that claimant supplied labor and materials for removing, repairing and reinstalling a burned out motor for an elevator located in the Chicago State Hospital, Chicago, Illinois, on February 16, 1955. The charges for such labor and material were billed to the Chicago State Hospital, but payment was refused.

Respondent did not file an answer. Therefore, it is considered that there is a general traverse or denial of the facts set forth in the complaint.

The amount of the claim is in the sum of \$484.46.

The record consists of the following :

1. Complaint
2. Motion of respondent to strike and dismiss the complaint of claimant
3. Proof of service of a copy of the motion of respondent on counsel for claimant

4. Substitution of attorneys
5. Order overruling motion to strike

A motion had been previously filed to strike the complaint because no contract was entered into, but this Court overruled it.

Respondent offered, and there was received in evidence, a Departmental Report, wherein it is stated that claimant removed, repaired and reinstalled the motor, that the work was necessary, the cost was reasonable, and the work was excellent.

It appears that this was an emergency matter. Even though there was no contract, claimant had been called on previous occasions to do work on elevators for which it had been paid; and, inasmuch as the chief maintenance officer of the Chicago State Hospital had ordered the emergency repairs made, claimant had been advised that the work would be approved and payment made. Inasmuch as this had come to the attention of the Division of Architecture and Engineering, who authorized the maintenance officer to have this work done, the mere fact that there was no contract, and the work was done in the 68th Biennium, which ended June 30, 1955, and all appropriations had lapsed on September 30, 1955, in our opinion does not defeat claimant's right to recover the sum of \$484.46.

Our only concern is, and we find it to be a fact, that this was an emergency matter. Claimant was a responsible party, and did its work in a satisfactory manner, and a fair and reasonable charge was made therefor.

An award is, therefore, made to claimant in the sum of \$484.46.

(No. 4787—Claimant awarded \$1,700.25.)

**COLUMBIA FIRE INSURANCE COMPANY, A CORPORATION,
Claimant, vs. STATE OF ILLINOIS, Respondent.**

Opinion filed May 12, 1959.

GILLESPIE, BURKE AND GILLESPIE, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

TAXES, FINES AND LICENSES—overpayment by insurance company. Evidence showed that claimant was entitled to an award pursuant to the provisions of Sec. 8F of the Court of Claims Act.

TOLSON, C. J.

Claimant, Columbia Fire Insurance Company, A Corporation, filed its complaint on August 2, 1957 to recover for an overpayment of its annual privilege tax for the year of 1952.

A stipulation was filed on March 26, 1959 reciting that the report of the Department of Insurance, under date of September 24, 1958, together with the complaint and motion for summary judgment of claimant, shall constitute the record in this cause.

Paragraph 4 of the complaint alleges the following :

“That for the calendar year of 1951, claimant paid taxes on the net receipts of its agencies, as provided in Sec. 414 of the Illinois Insurance Code, in the sum of \$1,700.25, and, by reason thereof, claimant was entitled to have the said sum of \$1,700.25 deducted from its privilege tax for the year 1952.”

The Departmental Report specifically admits the allegations contained in paragraph 4 of the complaint, and it would appear that the claimant is, therefore, entitled to reimbursement for its overpayment.

It is, therefore, ordered that an award be made to Columbia Fire Insurance Company, A Corporation, in the amount of \$1,700.25.

(No. 4794—Claimants awarded \$4,433.00.)

**WILLIAM MATHIS AND IOWA NATIONAL MUTUAL INSURANCE
COMPANY, Claimants, vs. STATE OF ILLINOIS, Respondent.**

Opinion filed **May** 12, 1959, Judge *Wham* dissenting.

McLAUGHLIN, PATTON AND McLAUGHLIN, Attorneys
for Claimants.

LATHAM CASTLE, Attorney General; **C. ARTHUR NEBEL**,
Assistant Attorney General, for Respondent.

HIGHWAYS—*duty to give notice of presence of repair crews.* The State is under a duty to erect signs warning motorists traveling on its highways that maintenance crews are engaged in repairing the highway.

CONTRIBUTORY NEGLIGENCE—*sudden emergency.* Evidence showed that claimant was faced with a sudden emergency when, upon passing the crest of a hill, he was confronted with a repair crew on the highway.

FEARER, J.

This case arises out of an accident, which occurred at approximately 8:15 A. M. on August 9, 1957 on Illinois Route No. 78, approximately three-fourths of a mile south of the City of Prophetstown, Whiteside County, Illinois.

The record consists of the following:

1. Complaint
2. Departmental Report
3. Transcript of evidence
4. Abstract of evidence
5. Supplement to the record
6. Brief and argument of claimants
7. Statement, brief and argument of respondent
8. Commissioner's Report

A hearing was had in this case before Commissioner Presbrey on June 28, 1958.

At the time and place in question, claimant, William Mathis, was driving his 1957 Pontiac in a southerly direction at or near the stockyard, the drive of which was located on the east side of the road just north of the crest of the hill where the accident occurred. The

entrance or apron to the yard was about 100 to 150 feet, wide.

Claimant, William Mathis, was on his way to work at the time of the accident. He was very familiar with the road, as it was the one on which he traveled to his place of employment, the Yorktown Lumber & Grain Company, where he was employed as office manager.

The weather was clear, the pavement was dry, and, as he approached the crest of the hill, knowing that the entrance to the stockyard was on the east side of the road, he looked to the left to determine whether or not there were any stock trucks pulling out onto the pavement. He could not see down the hill until he reached the crest, and it was approximately 200 feet from the crest of the hill to where the accident occurred.

There was no traffic behind or in front of him at said time, and he was driving at approximately 50 to 60 m.p.h. His attention was first called to a State Highway truck located on the west shoulder of the road, which he was traveling, with a man standing near it, and a man, whom he later learned was a State maintenance man, with his back towards him pouring tar, and working on the surface of the southbound traffic lane. He also noticed a truck traveling on the east side or northbound traffic lane, being a tractor-trailer driven by Carl Swanson, who testified at the hearing as to the location of the State truck and the State maintenance man working on the southbound traffic lane.

Claimant immediately applied his brakes, and turned into the northbound traffic lane. The tractor-trailer pulled to the shoulder of the road on the east side. Claimant's automobile turned counter-clockwise, and struck the left front portion of the trailer proceeding in a northerly direction.

The State employees were Rankin Murphy and Frank Weber, who were completing the patching of a portion of the highway in the southbound lane of travel, the patch being approximately 2 feet by 8 feet in size.

There is a slight discrepancy as to the distance from where the men were working to the crest of the hill. Mr. Weber testified that it was 250 feet from the crest of the hill to the scene of the accident, and claimant testified that it was from 150 feet to 200 feet south of the crest of the hill.

The record is clear as to the fact that the State employees, prior to commencing their work on the highway, did not erect metal or other signs warning traffic of the repair work in progress. Employees of the Division of Highways had been previously ordered when doing work of this nature on State highways to erect signals, signs, flags or other devices warning motorists of the presence of men on the highway doing repair work. This was both for the protection of motorists traveling upon said highways, as well as the State employees themselves.

There is no question but what the entrance on the east side of the road was familiar to the traveling public within that vicinity. It was a dangerous spot, being located near the crest of the hill, so that it was only normal that people familiar with the truck entrance would first look to the east to determine whether or not there were any trucks turning in or coming out of the yard. This is what claimant did, so that he was within 150 feet to 175 feet of Rankin Murphy when he first noticed him pouring tar on the highway. He immediately applied his brakes, and his car swerved. He turned onto the northbound traffic lane on the 18 foot highway, and came into contact with the tractor-trailer of Mr. Swanson, who was driving in a northerly direction. Mr. Swanson applied his

brakes, turned the tractor to the right, and reduced his speed to 35 to 40 m.p.h. He pulled the tractor off onto the shoulder, the trailer remaining in the northbound trafficlane, so that the impact took place on the shoulder on the east side of the road with the right front fender and right door of claimant's automobile and the left front of the trailer, approximately 30 to 35 feet north of where Mr. Rankin was working.

There was some question in regard to the car skidding when it hit a portion of the wet tar coated with pea gravel, which had been placed there by Frank Weber, who was standing off on the shoulder at the time of the impact.

Rankin Murphy during all this time did not leave the southbound traffic lane, but continued to work with his back facing north until after the collision. There appears to be no question but what he was standing upon the paved portion of the highway as claimant came over the crest of the hill, and when Mr. Smanson was driving his tractor-trailer north.

Respondent did not file an answer, so, therefore, a general denial or traverse of all allegations will be considered.

A Departmental Report was filed and received in evidence, and no question was raised as to the jurisdiction of the State of Illinois, Division of Highways, of this particular highway at the time of the accident. The Report also sets forth, and the statements are borne out by the evidence, that the concrete pavement at the location in question was 18 feet wide; that the pavement was bordered on each side by a concrete gutter section 3 feet in width; and, that an earth shoulder 10 feet in width exists back of each gutter section. The flag of each gutter

is 18 inches wide, thus making each lane of travel 10½ feet wide.

It appears from the Departmental Report that there were no signs in place either north or south of the accident site to indicate that highway maintenance operations were in progress. There was evidence, and it so appears in the Departmental Report, that skid marks were laid down both by claimant's automobile and Mr. Swanson's truck.

At the time of the accident claimant was 41 years of age, and was working for the Torktown Lumber & Grain Company as office manager with a take-home pay of \$82.52 a week.

Claimant was thrown from his vehicle, and was rendered unconscious for a short period of time. The injuries testified to consisted of a concussion, which resulted in double vision for approximately six weeks; and, abrasions of the scalp, which caused headaches for several months.

Claimant was removed from the scene of the accident by ambulance to a hospital in Morrison, and was hospitalized three days. He was home in bed two weeks, and returned to work one month later on a temporary basis. It was six weeks before he returned to work full time. He lost \$340.00 in wages.

From the exhibits offered in evidence, it appears that claimant incurred doctor bills of \$34.00, hospital expenses of \$85.25, and ambulance bill of \$15.00, which coupled with the loss of earnings make a grand total of \$484.00.

Claimant, William Mathis, had a \$50.00 deductible feature on his collision insurance policy with claimant, the Iowa National Mutual Insurance Company.

Count II is a claim on behalf of the Iowa National

Mutual Insurance Company, in which the damages to claimant's vehicle are set forth, as well as the settlement made with claimant, William Mathis, on August 21, 1957. This data is further corroborated by claimant's exhibit No. 2, an affidavit executed by John F. Mansfield, an adjuster for the Iowa National Mutual Insurance Company, which is as follows:

"TO WHOM IT MAY CONCERN:

I, John F. Mansfield, adjuster for the Iowa National Mutual Insurance Company, 605 Kahl Building, Davenport, Iowa, do depose and declare that on behalf of my company I effected a settlement with our policyholder, William Mathis, Prophetstown, Illinois on August 21, 1957. Said settlement was under this insured's collision policy **FAP 20 154 583**, which contained a \$50.00 deductible clause on his 1957 Pontiac Convertible, Motor No. P857H-2308. Mr. Mathis' car was a total loss with a market value (new) of \$3,100.00. Our auto damage appraiser's survey indicated this car should be depreciated in the amount of \$300.00 due to 12,959 miles usage. After applying this depreciation of \$300.00 and the \$50.00 deductible, I effected a cash settlement with the insured in an amount of \$2,750.00. Since net salvage recovery, after payment of towing and service charges of \$23.00, was \$317.00, the total loss to the company from this accident was \$2,433.00. This figure of \$2,433.00, plus our insured's \$50.00 deductible, constitutes \$2,483.00, which is our subrogation demand total. The salvage was sold to the Silvis Auto Wreckers on the basis of a high competitive bid of \$340.00. Bearman's bid was \$325.00.

(Signed) John F. Mansfield, Adjuster
Iowa National Mutual
Insurance Company"

Many authorities have been cited by claimants and respondent concerning the question of negligence and contributory negligence. There is no question but what the State of Illinois is not an insurer of motorists upon the highways, but the State does owe to the traveling public, and the traveling public has a right to expect that employees of the State will not create conditions in hazardous locations, such as the one in question, which could result and become the proximate cause of injury to it.

We have taken into consideration the location of the accident, being relatively close to the crest of the hill,

which would obscure the vision of a motorist traveling in a southerly direction without any warning whatsoever that there was work being performed on or in his lane of travel. The men working on the highway in claimant's lane of travel did create a condition, which required him to act under circumstances, which we consider would amount to a sudden emergency, particularly in view of the fact that he was familiar with the truck entrance on the east side of the road, and that he was not traveling at an unreasonable rate of speed considering the traffic, and the travel and use of the way prior to his reaching the crest of the hill.

In view of the fact that claimant was not warned that there was work being done in his traffic lane, and in view of the fact that he could not see the man on the highway pouring tar, or the truck traveling north, until he reached the crest of the hill, he had very little time for deliberation, and, he was, therefore, confronted with a sudden emergency. It appears from his actions that he acted as any ordinary prudent person would have acted under the same or similar circumstances, i.e., applied his brakes immediately, turned his automobile away from the man in front of him, and onto and across the fresh tar and pea gravel, which could very easily have caused his car to go out of control and into a skid. From his actions and the physical facts, we cannot find that Mr. Mathis was guilty of negligence, which was the proximate cause of the accident resulting in his injuries.

We believe that claimant has maintained the burden of proof that it was the negligence of respondent's employees in not erecting signs warning motorists traveling in the southbound traffic lane of the work being done on the highway, which was the proximate cause of the accident in question, particularly in view of the distance

from which the work was being done and the crest of the hill, and taking into consideration the truck entrance near the crest of the hill on the east side of the road, which were all hazardous. Respondent's employees are chargeable with, and should have acted accordingly to protect the traveling public.

It is, therefore, the finding of this Court that claimant has proven his case by a preponderance or greater weight of the evidence:

First: That he was free from contributory negligence after taking all the facts and circumstances into consideration;

Second: That it was the negligence of respondent's employees in creating the condition, which caused the accident, and it was respondent's negligence, which was the proximate cause of the accident resulting in injuries to claimant, William Mathis, and damages to the Iowa National Mutual Insurance Company.

Inasmuch as there are two claimants, William Mathis for personal injuries, including loss of earnings and the deductible portion of his insurance policy, and the Iowa National Mutual Insurance Company for its subrogation claim, awards are, therefore, made as follows:

William Mathis, the sum of \$2,000.00;

Iowa National Mutual Insurance Company, the sum of \$2,433.00, which takes into consideration the amount paid to claimant, William Mathis, less depreciation, salvage, towing and storage charges.

DISSENTING OPINION

WHAM, J.

I respectfully dissent from the majority. I believe that the facts contained in the record of this case fail to

establish that claimant was in the exercise of due care for his own safety, and that the proximate cause of the occurrence was the alleged negligence of respondent.

The fact that there were no signs indicating the presence of a State employee working on the highway did not alleviate the necessity for claimant to keep a proper lookout down the highway ahead as he approached and proceeded over the crest of the hill. Had he done so, he would have seen the workman present on the highway in sufficient time to have signaled a warning with his horn, and reduced his speed in a manner that would not have thrown him onto the wrong side of the road and into the truck approaching from the opposite direction.

Although there was some discrepancy in the record regarding the distance from the crest of the hill to the place where the maintenance man was standing, the distance at which a man could be seen was definitely established to be **425** feet. Even allowing for more than normal reaction time, I believe that a driver in the exercise of reasonable care could have kept his automobile under control and on its own side of the road, and avoided striking both the approaching truck and the maintenance man.

The presence of the maintenance man on the highway created no different condition than would have been created by either a slow moving vehicle or a pedestrian lawfully upon the highway at that point. Claimant would have applied his brakes in precisely the same manner, regardless of what confronted him, as he came over the crest of the hill, and the same result would have occurred. It is, therefore, difficult for me to arrive at the conclusion that the lack of warning signs proximately caused the occurrence in question.

I feel that claimant himself was negligent in looking

to the left and away from the direction of travel, while approaching the crest of the hill without reducing the speed of his automobile so as to compensate for the time involved in looking away from the direction in which he was proceeding. He should have anticipated the possibility of something over the crest of the hill, which would have been visible to him in time to avoid striking it had he continued to look ahead.

It is this that accounts for his failure to see the maintenance man until it was too late, and, therefore, at the very least, proximately contributed to the occurrence, which resulted in his own injury.

Nor can claimant rely upon the sudden emergency doctrine. As was stated in *Sullivan vs. Heyer*, 300 Ill. App. 599, "One cannot create an untoward situation or emergency by his own action, and then by reason of such situation so created be relieved from such responsibility as the law requires of a person acting under normal conditions." In *Dee vs. City of Peru*, 343 Ill. 36 at 44, the court stated: "The law does not afford to one, who so exposes himself to danger, the privilege of recovering damages for an injury arising from his actions, which injury might have been avoided by the use of reasonable care for his own safety."

For the above reasons, I believe that the claim should be denied.

(No. 4804—Claimants awarded \$3,624.72.)

**NEW HAMPSHIRE FIRE INSURANCE COMPANY, A CORPORATION;
AND GRANITE STATE FIRE INSURANCE COMPANY, A CORPORATION,
Claimants, vs. STATE OF ILLINOIS, Respondent.**

Opinion filed May 12, 1959.

ARRINGTON AND HEALY, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

TAXES, FINES AND LICENSES—*overpayments by insurance companies.*

Evidence showed that claimants were entitled to awards pursuant to the provisions of Sec. 8F of the Court of Claims Act.

WHAM, J.

Claimants in this case seek reimbursement for overpayment of 1952 taxes to the State of Illinois. As in the case of the *Calvert Fire Insurance Company*, Claimant, vs. *State of Illinois*, Respondent, No. 4805, in which we granted an award as of this date, no novel questions of law are involved, nor is there a dispute on the facts. Respondent has acknowledged the validity of the claims involved in this case. The Commissioner, who heard the case, has recommended the allowance of the claims, and we hereby adopt as our opinion in this case the following report of the Commissioner :

"Claimant, New Hampshire Fire Insurance Company, A Corporation, by Arrington and Healy, its attorneys, filed a complaint in the Court of Claims on January 27, 1958, which consists of Two Counts. Count I is in the name of the New Hampshire Fire Insurance Company, A Corporation, and Count II is in the name of The Granite State Fire Insurance Company, A Corporation.

In the New Hampshire Fire Insurance Company case claimant alleges that during the year 1952 it received from the sale of fire insurance in the State of Illinois net taxable premiums, taxable under the provisions of the Illinois Insurance Code (Chap. 73, Sec. 409(1), Par. 1021(1), Ill. Rev. Stats., 1951), in the amount of \$733,194.87, as set forth in its 1952 privilege tax statement filed with the Director of Insurance of the State of Illinois, a copy of which statement was attached to said complaint and marked exhibit A.

Said taxable premiums, when assessed at the applicable premium tax rate of 2%, produced a tax of \$14,663.90 before allowance for deductions authorized by Sec. 409(2) of the Illinois Insurance Code, (Chap. 73, Par. 1021(2), Ill. Rev. Stats., 1951), and pursuant to said statute claimant claimed and allowed credit for deductions, representing amounts paid by claimant for the benefit of organized fire departments in cities, villages, incorporated towns and fire protection districts of the State of Illinois.

\$780.14 was paid by claimant's Cook County Manager's Office, and

\$2,101.47 was paid through the Home Office of claimant, as set forth in line 5 of exhibit A, making a total of \$2,881.61. Claimant deducted said sum of \$2,881.61 from its tax in the amount of \$14,663.90, and paid the Director of Insurance of the State of Illinois the resultant sum of \$11,782.29 as and for its 1952 premium tax for the privilege of doing business in the State of Illinois. (A photostatic copy is attached, and marked exhibit C.)

During the year of 1952, claimant paid to the City of Chicago 2% of its gross receipts of premiums received for fire insurance upon property situated within the municipality during the said year as tax for the benefit of the Chicago Fire Department, pursuant to Art. 38, Sec. 1 of the Cities and Villages Act, (Chap. 24, Par. 38-1, Ill. Rev. Stats., 1951, and Chap. 131-2 of the Municipal Code of Chicago, said payments amounting to \$2,728.91. (Photostatic copy of said receipt is marked and attached to said complaint as exhibit D.)

Claimant inadvertently failed to include said sum in the entry on line 5 of the aforesaid tax statement, (exhibit No. 1), or otherwise to deduct said payment from its 1952 privilege tax.

Pursuant to the aforementioned provisions of Sec. 409(2) of the Illinois Insurance Code (Chap. 73, Par. 1021(2), Ill. Rev. Stats., 1951), claimant is entitled to a deduction from its premium privilege tax for all sums paid to municipalities for fire department taxes, and, therefore, is entitled to an additional deduction in the amount of \$2,728.91 from its premium privilege tax (in addition to the amounts set forth in paragraph 3 hereof), totaling \$2,881.61.

Claimant alleges that there is no provision under the laws of the State of Illinois for reimbursement for the foregoing overpayment of its 1952 premium privilege tax in the aforesaid amount of \$2,728.91, except through recourse in the Court of Claims.

Claimant conferred with the Director of Insurance of the State of Illinois and its authorized representatives, and has presented to said persons the facts alleged. The Director of Insurance and his duly authorized representatives have confirmed that they are without legal authority to refund the foregoing payments, and have stated that recovery of the same can be solicited only through the Court of Claims in a formal complaint. Claimant stated that this cause of action was previously presented to the Court of Claims under Case No. 4629, and that on November 9, 1954 the Court of Claims denied recovery.

Claimant further states that it is entitled to recover herein by reason of the amendments to Sections 8 and 22 of "An Act to create the Court of Claims". The Act, entitled "Senate Bill No. 691", and approved by the 70th General Assembly on July 11, 1957, provides in subsection F of Section 8:

'All claims for recovery of overpayment of premium taxes or fees or other taxes by insurance companies made to the State resulting from failure to claim credit allowable for any payment made to any political subdivision or instrumentality thereof. Any claim in this category,

which arose after July 15, 1945 and prior to the effective date of this amendatory Act, may be prosecuted as if it arose on the effective date of this amendatory Act without regard to whether or not such claim has previously been presented or determined.'

Therefore, the New Hampshire Fire Insurance Company, A Corporation, requested judgment against respondent, the State of Illinois, in the amount of \$2,728.91.

Count II is the claim of the Granite State Fire Insurance Company, A Corporation, by Arrington and Healy, its attorneys, who allege that it is a duly organized insurance company, licensed to transact fire insurance business in the State of Illinois; and, that during the year of 1952 claimant received from the sale of fire insurance in the State of Illinois net taxable premiums, taxable under the provisions of the Illinois Insurance Code, in the amount of \$106,313.38, as set forth in its 1952 privilege tax statement filed with the Director of Insurance of the State of Illinois, a copy of which was attached to the complaint and marked exhibit B.

Said net taxable premiums, when assessed at the applicable premium tax rate of 2%, produced a tax of \$2,126.27 before the allowance of deductions authorized by Sec. 409(2) of the Illinois Insurance Code (Chap. 72, Par. 1021(2), Ill. Rev. Stats., 1951). Pursuant to said statutory section, claimant claimed and was allowed credit deductions, representing amounts paid by claimant for the benefit of organized fire departments in cities, villages, incorporated towns and fire protection districts of the State of Illinois, in said amount, totaling \$464.69. (See line 5 of exhibit B.)

Claimant deducted said sum of \$464.69 from its tax in the amount of \$2,126.27, and paid to the Director of Insurance of the State of Illinois the resultant sum of \$1,661.58 as and for the 1952 premium tax privilege of doing business in this State. (Photostatic copy of check attached, and marked exhibit E.)

During the year of 1952, claimant paid the City of Chicago 2% of its gross receipts of premiums received from fire insurance on property situated in that municipality. Said tax was for the benefit of the Chicago Fire Department, pursuant to Art. 38, Sec. 1 of the Cities and Villages Act, said payment amounting to \$743.11. (Photostatic copy of receipt of payment is attached and marked exhibit F.) Said claimant inadvertently failed to include said sum in the entry on line 5 of the aforesaid statement (exhibit B), or otherwise to deduct such payment from its 1952 privilege tax.

Pursuant to the aforesaid provisions of Sec. 409(2) of the Illinois Insurance Code, claimant is entitled to take deductions from its premium privilege tax for all the sums paid to municipalities for fire department taxes, and is, therefore, entitled to an additional deduction in the amount of \$743.11.

Claimant further states that it is entitled to recovery herein by reason of the amendments to Sections 8 and 22 of "An Act creating the Court of Claims". The Act, entitled "Senate Bill No. 691", approved by the 70th General Assembly, was cited above in the New Hampshire Fire Insurance Company case.

Claimant, therefore, makes claim against the State of Illinois in the amount of \$743.11.

Your Commissioner set this case for hearing on the 20th day of November, 1958 at 160 North LaSalle Street, Chicago, Illinois, and respondent, State of Illinois, in a stipulation, which was filed with your Commissioner, agreed that, if Mr. H. C. Ferry, Secretary of the New Hampshire Fire Insurance Company, was present, he would testify that during the year of 1952 claimant received from the sale of fire insurance in the State of Illinois net taxable premiums in the amount of \$733,194.87, as set forth in the 1952 privilege tax statement filed with the Director of Insurance of the State of Illinois, a copy of which was attached to the stipulation and marked exhibit A; and, that said net taxable premiums, when assessed at the applicable premium tax rate of 2%, produced a tax of \$14,663.90 before allowance of deductions in accordance with the Illinois Insurance Code. Therefore, the amount due the New Hampshire Fire Insurance Company, A Corporation, would be \$780.14 paid by the Cook County Manager's Office, and \$2,101.47 paid by the Home Office, which makes a total of \$2,881.61.

Your Commissioner has examined all of the exhibits and the stipulation, and recommends that an award be made in the amount of \$2,881.61 to the New Hampshire Fire Insurance Company, and **\$743.11** to the Granite State Fire Insurance Company, A Corporation."

It is, therefore, ordered that an award be made to the New Hampshire Fire Insurance Company, A Corporation, in the amount of \$2,881.61, and an award be made to the Granite State Fire Insurance Company, A Corporation, in the amount of \$743.11.

(No. 4805—Claimant awarded \$3,652.86.)

CALVERT FIRE INSURANCE COMPANY, A CORPORATION, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed **May 12**, 1959.

ARRINGTON AND HEALY, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; **LESTER SLOTT**,
Assistant Attorney General, for Respondent.

TAXES, FINES AND LICENSES—*jurisdiction* for overpayments *by* insurance companies. Act of July 11, 1957 amended Sec. 8 of the Court of Claims Act to provide for recovery of overpayments of taxes by insurance companies resulting from failure of companies to claim credits for payments to political subdivisions.

SAME—overpayment of taxes by insurance company. Evidence showed that claimant was entitled to an award pursuant to the provisions of Sec. 8F of the Court of Claims Act.

WHAM, J.

This case involves a suit brought by claimant to recover reimbursement for overpayment of taxes to the State of Illinois during the years of 1950, 1951, 1952 and 1953. No novel questions of law are involved, since we have passed on this same question in the cases of the *Columbia Fire Insurance Company, A Corporation*, Claimant, vs. *State of Illinois*, Respondent, No. 4787, and *American Indemnity Company, A Corporation*, Claimant, vs. *State of Illinois*, Respondent, No. 4834. There are no disputes of facts in this case, and respondent has acknowledged the validity of the claim. The Commissioner recommended that the award be allowed, and we hereby adopt his report as our opinion in the case:

“The Calvert Fire Insurance Company, A Corporation, by Arrington and Healy, its attorneys, filed its complaint against the State of Illinois with the Court of Claims on January 27, 1958 contending that claimant, Calvert Fire Insurance Company, A Corporation, incorporated under the laws of the State of Pennsylvania, was licensed to transact business in the State of Illinois.

During the year of 1950, claimant reported that it received from the sales of fire insurance in the State of Illinois net taxable premiums, taxable under the provisions of the statutes of the State of Illinois, in the amount of \$210,768.17, as set forth in exhibit A attached to the complaint. A tax payment was remitted to the Department of Insurance in the amount of \$1,053.84, exhibit B attached to said complaint. During the year of 1951, claimant reported that it received from the sales of fire insurance in the State of Illinois net taxable premiums, taxable under the provisions of the State of Illinois, in the amount of \$226,778.81, and that a tax payment was remitted to the Department of Insurance of the State of Illinois in the amount of \$1,133.89, as exhibited by copy of draft marked exhibit D.

During 1952, claimant reported it received from the sales of fire insurance in the State of Illinois net taxable premiums, taxable under the provisions of the statutes of the State of Illinois, in the amount of \$268,177.72, as set forth in exhibit G, and that a tax payment was remitted to the Department of Insurance of the State of Illinois in the amount of

\$1,340.89, exhibit H. Claimant alleges that the payments on its part, referred to in paragraphs 2, 3, 4 and 5, were made because of an error in reporting; the premiums, which were subject to the Fire Marshal tax. The net taxable premiums, as shown on exhibits of premiums for the purpose of the Fire Marshal premium tax for the years mentioned above, included theft, comprehensive and miscellaneous premiums, and were not purely auto fire premiums or premiums subject to the fire marshal tax. When National Automobile Underwriters Association's percentages are applied, and the fire portions of the premium are extracted and used as a basis for determining the tax to be paid, the results should have been as follows:

Year	Premiums Reported	Fire Prem. Determined By Applying N.A.U.A.%	Tax Remitted	Recompu- tation of Tax	Over- Payment
1950 -----	\$ 210,768.17	\$ 67,972.48	\$1,053.84	\$ 339.86	\$ 713.98
1951 -----	226,778.81	74,009.39	1,133.89	370.05	763.84
1952 -----	327,876.81	87,796.94	1,639.38	438.98	1,200.40
1953 -----	268,177.72	73,249.02	1,340.89	366.25	974.64
Total-----	\$ 1,033,601.51	\$303,027.83	\$5,168.00	\$1,515.14	\$3,652.86

Claimant alleges that no provision under the laws of the State of Illinois provides for reimbursement of the foregoing overpayments of 1950, 1951, 1952 and 1953 Fire Marshal premium taxes in the amount of \$3,652.86 except through recourse in the Court of Claims. Therefore, its claim was filed in this Court. Claimant further states that it is entitled to recover herein by reason of the amendments to Sections 8 and 22 of "An Act to create the Court of Claims". This Act, entitled "Senate Bill No. 691," and approved by the 70th General Assembly on July 11, 1957, provides in subsection F of Section 8:

'All claims for recovery of overpayment of premium taxes or fees or other taxes by insurance companies made to the State resulting from failure to claim credit allowable for any payment made to any political subdivision or instrumentality thereof. Any claim in this category, which arose after July 15, 1945 and prior to the effective date of this amendatory Act, may be prosecuted as if it arose on the effective date of this amendatory Act without regard to whether or not such claim has previously been presented or determined.'

Your Commissioner set this case for hearing on November 20, 1958 at 160 North LaSalle Street, Chicago, Illinois, and a stipulation was presented to your Commissioner as claimant's exhibit A, which in substance admits the liability of the following overpayments: 1950—\$713.98; 1951—\$763.84; 1952—\$1,200.40; and, 1953—\$974.64, making a total for the four years of \$3,652.86.

Your Commissioner has examined the stipulation and all of the exhibits.

Your Commissioner, therefore, recommends that an award be made to the Calvert Fire Insurance Company, A Corporation, in the amount of \$3,652.86."

It is, therefore, ordered that an award be made to claimant, Calvert Fire Insurance Company, A Corporation, in the amount of \$3,652.86.

(No. 4809—Claimant awarded \$1,828.95.)

**MARKET MENS MUTUAL INSURANCE COMPANY, A CORPORATION,
Claimant, vs. STATE OF ILLINOIS, Respondent.**

Opinion filed May 12, 1959.

NICHOLAS S. KIEFER, Attorney for Claimant.

LATHAM CASTLE, Attorney General; LESTER SLOTT,
Assistant Attorney General, for Respondent.

TAXES, FINES AND LICENSES—overpayment by insurance company. Evidence showed that claimant failed to deduct all just credits from the gross amount of privilege tax due, and is, therefore, entitled to reimbursement pursuant to the provisions of Sec. 8F of the Court of Claims Act.

WHAM, J.

Claimant in this case seeks reimbursement for overpayment of 1955 and 1956 taxes to the State of Illinois. As in the case of the *Calvert Fire Insurance Company*, Claimant, vs. *State of Illinois*, Respondent, No. 4805, in which we granted an award this date, no novel questions of law are involved, nor is there a dispute on the facts. Respondent has acknowledged the validity of the claim involved in this case. The Commissioner, who heard the case, has recommended the allowance of the claim, and we hereby adopt as our opinion in this case the following report of the Commissioner :

"The above entitled cause was set for hearing on two occasions. The parties to said cause did not introduce any evidence, but entered into a stipulation of facts, said stipulation of facts being filed in the Court of Claims on September 11, 1958.

According to the stipulation, claimant is an insurance company incorporated under the laws of the State of Wisconsin. It has been admitted to transact the business of fire insurance in Illinois. It appears that in 1955 claimant paid a gross annual privilege tax of \$2,555.01. In 1956 the gross annual privilege tax of said claimant was \$2,528.24. In 1955 claimant paid to the City of Chicago the sum of \$970.89 in fire department tax, and failed to claim said amount as a deduction from its gross annual privilege tax. In August of 1955 claimant paid to the City of Chicago the sum of \$858.06 in fire department taxes, but failed to claim a deduction of said amount from its 1956 gross annual privilege tax levied by respondent.

Claimant maintains it is entitled to deduct from the gross amount of premium taxes due to the State of Illinois in any year the amounts paid in the previous year to Illinois municipalities for support of their fire departments, and bases its claim upon Sec. 409 of the Illinois Insurance Code (Ill. Rev. Stats., 1957, Chap. 73, Sec. 1021), and Sec. 8F of the Court of Claims Act, (Ill. Rev. Stats., 1957, Chap. 37), which provides that, having failed to claim in the immediately succeeding year a deduction for taxes paid to a municipality for support of its fire department, claimant is entitled to recover in the Court of Claims from respondent the overpayment of premium tax.

An examination of the aforesaid provisions of the Illinois Insurance Code and Sec. 8F of the Court of Claims Act clearly indicates that claimant is entitled to recover the sum of \$970.89 for the overpayment of its premium tax for the year 1955, and the sum of \$858.06 for the year 1956. Therefore, this Commissioner recommends that the Court allow the claim of claimant in the aforesaid amounts."

It is, therefore, ordered that an award be made to claimant, Market Mens Mutual Insurance Company, A Corporation, in the amount of \$1,828.95.

(No. 4834—Claimant awarded \$611.81.)

AMERICAN INDEMNITY COMPANY, A CORPORATION, Claimant, *vs*,
STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1959.

PFLIFER, FIXMER AND GASAWAY, Attorneys for Claimant.

LATHAM CASTLE Attorney General; C. ARTHUR NEEBEL, Assistant Attorney General, for Respondent.

TAXES, FINES AND LICENSES—*overpayment* by insurance company. Evidence showed that claimant was entitled to an award pursuant to the provisions of Sec. 8F of the Court of Claims Act.

FEARER, J.

A complaint was filed in this cause on July 29, 1958 by the American Indemnity Company, A Corporation.

The record consists of the following:

1. Complaint
2. Stipulation in lieu of evidence
3. Statement, brief and argument of claimant
4. Commissioner's Report.

The Commissioner adopted the stipulation, and recommended an award in the amount of \$611.81.

Claimant, **A** Texas Corporation, was authorized and licensed to transact and conduct fire insurance business in the State of Illinois. During the year of 1956 it received from the sale of fire insurance in the State net premiums, taxable under the provisions of the Illinois Insurance Code (Chap. 78, Sec. 409, Par. 1021, 1957 Ill. Rev. Stats.), in the amount of \$1,236,148.89, as set forth in its 1956 privilege tax statement filed with the Director of Insurance, a copy of which is attached to the complaint, marked exhibit **A**, and made a part thereof.

It is set forth in the complaint that net taxable premiums, when assessed at the applicable premium tax rate of 3.85%, produced a tax of \$47,591.74 before allowance for deductions authorized by Sec. 409 of the Illinois Insurance Code (Chap. 73, Par. 1021 (2), 1957 Ill. Rev. Stats.). Claimant claimed and was allowed credit for deductions representing amounts paid by claimant to cities, villages and incorporated towns and fire protection districts of the State of Illinois, for the benefit of organized fire departments, which totalled \$398.38.

Claimant deducted the sum from said tax in the amount of \$47,591.74, and paid to the Director of Insurance the sum of \$47,193.36 for its 1956 premium tax for the privilege of doing business in the State of Illinois.

(This was represented by a photostatic copy of a check, marked exhibit B, and by reference made a part of said complaint.)

It is further alleged that in 1956 claimant paid to various incorporated cities, towns and villages of the State of Illinois 3.85% of its gross receipts of premiums received for fire insurance upon property situated within the respective municipalities during said year as taxes for the benefit of the respective organized fire departments pursuant to the provisions of Art. 38, Sec. 1 of the Cities and Villages Act (Chap, **24**, Par. 38-1, Ill. Rev. Stats., 1957). Said payments were as follows:

City of Chicago _____	\$ 545.36
Village of Wilmette _____	2.73
City of East St. Louis _____	25.53
Town of Cicero _____	13.18
City of Decatur _____	25.01
<hr/>	
Total _____	\$ 611.81

Copies of the receipts are attached to the complaint, by reference made a part thereof, and marked exhibits C, D, E, F and G.

It is alleged that claimant inadvertently failed to include said sum of \$611.81 as a credit toward the payment of the said tax in the amount of \$47,591.74, or to otherwise deduct such payments from its 1956 privilege tax aforesaid.

Claimant, under the laws of this State, is entitled to a deduction from its premium privilege tax for all sums paid to municipalities for fire department taxes, and is, therefore, entitled to an additional deduction in the amount of \$611.81 from its 1956 premium privilege tax in addition to the amount of \$398.38 set forth in its complaint.

There would be no authority for the Director of

Insurance to reimburse claimant for the overpayment, and the only way that this overpayment can be recovered is in this Court by reason of certain amendments to Sections 8 and 22 of "An Act to create the Court of Claims". This Act, entitled "Senate Bill No. 891", and approved by the 70th General Assembly on July 11, 1957, provides in subsection F of Section 8:

"All claims for recovery of overpayment of premium taxes or fees or other taxes by insurance companies made to the State resulting from failure to claim credit allowable for any payment made to any political subdivision or instrumentality thereof. Any claim in this category, which arose after July 15, 1945, and prior to the effective date of this amendatory Act, may be presented as if it arose on the effective date of this amendatory Act without regard to whether or not such claim has previously been presented or determined."

Inasmuch as there has been an overpayment, and claimant would have been entitled to a further credit of \$611.81; and, further, in view of the Act of the General Assembly passed on July 11, 1957, an award is, therefore, made to claimant in the amount of \$611.81.

(No. 4849—Claimant awarded \$3,791.62.)

RICHARD B. AUSTIN, Claimant, *vs.* **STATE OF ILLINOIS**,
Respondent.

Opinion filed May 12, 1959.

RICHARD B. AUSTIN, Claimant, *pro se*.

LATHAM CASTLE, Attorney General; **LESTER SLOTT**,
Assistant Attorney General, for Respondent.

STATE OFFICERS AND AGENTS—court reporters. Where evidence showed that a judge of the Superior Court appointed a court reporter according to law, but that there were insufficient funds for payment by the Auditor of Public Accounts, the judge is entitled to reimbursement for the monies expended from his individual funds for the statutory salary of the reporter.

WEAM, J.

Claimant, Richard B. Austin, Judge of the Superior Court of Cook County, has filed his complaint in this

cause asking an award in the amount of \$3,791.62 to reimburse him for monies advanced from his own funds to compensate Vonnie Donnelly for services rendered as his official court reporter from March 1, 1958 to October 1, 1958. This case was heard in Chicago on January 21, 1959 before Commissioner Herbert G. Immenhausen. No defense was made by the State of Illinois, and the Assistant Attorney General representing respondent admitted in open court that the State was indebted to claimant in the amount asked. The Commissioner, after hearing the evidence, recommended that an award be made in the amount claimed.

We have examined the Commissioner's Report, as well as the records submitted in the cause, and do hereby adopt the report in the following words and figures:

"Richard B. Austin filed his complaint on December 16, 1958 alleging that he was a duly elected Judge of the Superior Court of Cook County since December 1, 1953;

That on November 20, 1957 he appointed Vonnie Donnelly as his official court reporter, and said appointment was approved by the Executive Committee of the Superior Court of Cook County;

That he forwarded the notice of appointment to Elbert S. Smith, Auditor of Public Accounts, receipt of which was acknowledged on November 26, 1957;

That on February 21, 1958, he forwarded to the said Elbert S. Smith a signed official oath of office and loyalty oath of the said Vonnie Donnelly, receipt of which was acknowledged by the said Elbert S. Smith;

That the said Elbert S. Smith, Auditor of Public Accounts, advised claimant that there were insufficient funds appropriated by the Legislature to place the said Vonnie Donnelly on the State payroll, and that he would be unable to do so until such time as a vacancy occurred;

That the said Vonnie Donnelly assumed her office on March 1, 1958, and faithfully, diligently and competently performed the duties of an official court reporter of the State of Illinois from that date to the present time;

That on October 1, 1958 the said Elbert S. Smith advised claimant that a vacancy had occurred, and since that time the said Vonnie Donnelly has been receiving from the State of Illinois the compensation as provided by statute; but, during the period of March 1, 1958 to October 1, 1958, Richard B. Austin, claimant herein, advanced from his own funds to the said Vonnie Donnelly her statutory compensation of \$3,791.62.

The State of Illinois did not file an answer, and the case was set for hearing before the undersigned on January 21, 1959 at 160 North LaSalle Street, Chicago, Illinois. Richard B. Austin was sworn, and testified that he was a Judge of the Superior Court of Cook County;

That on November 20, 1957 he appointed the said Vonnice Donnelly, who was skilled in verbatim reporting, and who had been a bonafide resident of the State of Illinois for more than one year, as his official court reporter;

That said appointment was approved by the Executive Committee of the Superior Court pursuant to Par. 163a, Chap. 37, Ill. Rev. Stats., 1957; and that he forwarded that appointment to the said Elbert S. Smith, Auditor of Public Accounts, and received an acknowledgment on November 26, 1957;

That on February 21, 1958, he forwarded to the said Elbert S. Smith, the duly signed official oath of office and loyalty oath executed by the said Vonnice Donnelly, receipt of which was acknowledged by the said Elbert S. Smith;

That the said Elbert S. Smith, Auditor of Public Accounts, advised him there were insufficient funds appropriated by the last Legislature to place the said Vonnice Donnelly on the State payroll, and that he would be unable to do so until such time as a vacancy occurred;

That the said Vonnice Donnelly assumed her office on March 1, 1958, and has faithfully, diligently and competently performed the duties of an official court reporter of the State of Illinois from that date to the present time.

On October 1, 1958, State Auditor Elbert S. Smith advised Richard B. Austin that a vacancy had occurred, and since that time the said Vonnice Donnelly has been receiving from the State of Illinois her compensation as provided in Sec. 163b, Chap. 37, Ill. Rev. Stats., 1957;

That during the period from March 1, 1958 to October 1, 1958 Richard B. Austin advanced each month from his own funds to the said Vonnice Donnelly her statutory compensation of \$541.66 for a total of \$3,791.62.

Thereupon, exhibit No. 1 was identified. It consisted of cancelled checks issued by Richard B. Austin to the said Vonnice Donnelly, and was introduced in evidence.

Then, the said Vonnice Donnelly testified that she was skilled in verbatim court reporting, and that on March 1, 1958 assumed her office as official court reporter for Richard B. Austin. She stated in length her duties, the number of cases she took as such court reporter, and testified that from March 1, 1958 to October 1, 1958 she received her compensation from Richard B. Austin each month in the amount of \$541.66, making a total of \$3,791.62.

The Attorney General presented a stipulation, signed by Richard B. Austin and Latham Castle, stating that Richard B. Austin was a duly elected Judge of the Superior Court of Cook County since December 1, 1953; that on November 20, 1957, he appointed the said Vonnice Donnelly,

who was a skilled verbatim reporter, and who had been a bonafide resident of the State of Illinois for more than one year, as his official court reporter, and the said appointment was approved by the Executive Committee of the Superior Court of Cook County pursuant to Par. 163a, Chap. 37, Ill. Rev. Stats., 1957; that the said Elbert S. Smith, Auditor of Public Accounts, advised claimant there were insufficient funds appropriated by the Legislature to place the said Vonnie Donnelly on the State payroll; that the said Vonnie Donnelly assumed her office on March 1, 1958, and faithfully, diligently and competently performed the official duties of court reporter of the State of Illinois from that date to the present.

Your Commissioner has examined the statute, and finds that Chap. 37, Par. 163a, provides for the appointment of court reporters, as follows:

‘Each of the several judges of the Circuit, Superior, City and Town courts in this State is authorized to appoint one official shorthand reporter, who shall be skilled in verbatim reporting, and who shall have been a bonafide resident of the State of Illinois for one year, and whose duties shall be as hereinafter specified. * * * * *’

Par. 163b provides for the duties and compensation:

‘The reporter shall take full stenographic notes of the evidence in trials before the court for which he is appointed, and shall furnish one transcript of them, if requested by either party to the suit, or by his attorney, or by the judge of the court, to the person requesting it. When not engaged in the taking or transcribing of stenographic notes of evidence, the reporter shall perform secretarial services and such other duties in connection with the court as the judge appointing him shall direct. * * * * * The salaries of the reporters above named, provided to be paid out of the State Treasury, shall be paid to them monthly on the warrant of the Auditor of Public Accounts, out of any money in the State Treasury not otherwise appropriated. * *’

Therefore, it appears from the evidence that claimant has proven his case by a preponderance of the evidence, and it is my recommendation that an award be made in the amount of \$3,791.62 to Richard B. Austin.”

An award is, therefore, made to claimant in the amount of \$3,791.62.

(No. 3025—Claimant awarded \$2,919.27.)

ELVA JENNINGS PENWELL, Claimant, vs. STATE OF ILLINOIS,
 . Respondent.

Opinion fled May 23, 1959.

JOHN W. PREIHS, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL,
 Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*supplemental award*. Under the authority of *Penwell vs. State*, 11 C.C.R. 365, claimant awarded expenses incurred for nursing care, drugs, etc., for the period from July 1, 1958 to April 1, 1959.

TOLSON, C. J.

On April 23, 1959, claimant, Elva Jennings Penwell, filed a supplemental petition for reimbursement for monies expended by her for medical services and expenses from July 1, 1958 to April 1, 1959.

On May 2, 1959, claimant and respondent filed a joint motion for leave to waive the filing of briefs and arguments, and alleged that claimant's receipts for payment of medical bills and services constituted the entire evidence in the case.

Claimant was injured in an accident, while employed at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The accident occurred on February 2, 1936, and the original award is reported in 11 C.C.R. 365. This Court retained jurisdiction of the case, and successive awards have been made from time to time.

The petition before the Court at this time again discloses that claimant is permanently disabled, and is entitled to an additional award.

Original receipts, received in evidence, establish the following claim :

Item A:	Nursing	\$ 1,138.65
	Room and Board for Nurses	477.75
Item B:	Drugs and Supplies	102.48
Item C:	Physician	1,175.39
Item D:	Transportation	25.00
Total		\$ 2,919.27

An award is, therefore, made to claimant for monies expended from July 1, 1958 to April 1, 1959 in the amount of \$2,919.27.

The Court reserves jurisdiction for further determination of claimant's need for additional medical care.

(No. 4580—Claimant awarded \$5,119.10.)

BOSLEY WRECKING COMPANY, AN ILLINOIS CORPORATION,
Claimant, **vs.** STATE OF ILLINOIS, Respondent.

Opinion filed ~~May~~ 23, 1959.

CHERRY AND MORSE, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; MARION G. TIER-
NAN, Assistant Attorney General, for Respondent.

CONTRACTS—*damages for* unreasonable delays. The State is liable for the actual damages sustained by a contractor arising from unreasonable delays caused solely by the State and not through the fault of the contractor, nor attributable to his failure in protecting himself from the effects of delays, which might reasonably have been foreseen.

SAME—*same*. Evidence showed that failure to have buildings vacated for demolition by claimant within the contract period was not waived by claimant's inspection of premises before signing contract, nor excused by the existence of a contract between respondent and a third party, whose **duty it** was to vacate the property.

WHAM, J.

This is a suit on a contract entered into between claimant, Bosley Wrecking Company, An Illinois Corporation, and the State of Illinois, wherein claimant agreed to wreck and remove 66 buildings lying in the path of a proposed State highway for the stated consideration of \$9,442.00.

Claimant contends that it was greatly delayed in fulfilling the terms of its contract by reason of the buildings not being made available to it within the time set forth in the contract, and that by reason thereof it sustained damages in increased labor costs and additional expenses required because of the delay. Claimant's Count I of the amended complaint prays damages in the amount of \$5,119.30, plus 10% of the contract withheld from it by the State of Illinois.

It is respondent's position that the State of Illinois is not responsible for the delay and resulting increased costs and expenses.

The contract further provided that "all of the buildings for this contract are to be vacated on or before November 1, 1950". The contract required claimant to complete the wrecking and removal of the buildings not later than March 24, 1951, which was 70 days from the date of the execution of the contract.

The evidence established that claimant commenced work within 10 days after the execution of the contract, but work had to be suspended in view of the fact that only 35 of the 66 buildings to be removed had been vacated within the time specified in the contract. Twenty-nine of the buildings were not made available until after June 1. These buildings were available for wrecking at various times between June 1, 1951 and June 1, 1952. Two of the buildings were not available for wrecking by claimant until after June 1, 1952.

This delay was in no way caused by claimant. It was the delay in making these buildings available to claimant, which caused the increase in labor cost and other expenses incurred by claimant in completing the contract.

Respondent contends that, from the time the contract was signed, it was apparent that the buildings were not vacated, and, therefore, the provisions of the contract stating that they would be vacated by November 1, 1950 was waived by claimant, who had knowledge that they were not vacated. Respondent relies upon Art. IV of the proposal in support of this contention. It reads as follows:

"The undersigned further declares that he has carefully examined the proposal, plans, specifications, form of the contract and contract bond and special provisions, if any, and that he has inspected in detail the site of the proposed work, and that he has familiarized himself with all the local conditions affecting the contract, and the detailed requirements of construction, and understands that in making this proposal he waives all right to plead any misunderstanding regarding the same."

This contention is not well taken in view of the fact that, although it might have been apparent to claimant at the time of signing the contract that people were still living in the buildings, it had a right to presume that the ground work had been laid for moving the people within the period of time required by the contract for the wrecking of the buildings.

Respondent next contends that it had a separate contract with the City of Chicago, and places the responsibility for vacating the 66 buildings on the City of Chicago acting as an independent contractor. This contract, was admitted into evidence by the Commissioner with the understanding that it be connected up with claimant. There is no evidence in the record that claimant had any knowledge of the existence of this contract, and, therefore, could not be bound to take notice that someone other than the State of Illinois was responsible for procuring the vacation of the buildings.

We believe that this case comes within the rule announced in *Stramberg Brothers Co. vs. State of Illinois*, 8 C.C.R. 87 (1937), where it is stated:

"The State is liable for the actual damage sustained by a contractor arising from unreasonable delays caused solely by the State and not through the fault of the contractor, nor attributable to his failure in protecting himself from the effects of delays, which might reasonably have been foreseen."

We believe that claimant was unreasonably delayed by respondent's failure to make available the buildings for demolition; and that claimant was without fault in the matter, and complied with its part of the contract.

With respect to the question of damages resulting from respondent's breach of contract, claimant contends that it is entitled to the following:

For increased labor costs, the sum of \$2,741.80.

For additional costs to remove fly dump material, the sum of \$847.00.

For increased insurance costs, the sum of \$559.30.

For monies withheld, being 10% of contract, or the sum of \$944.00, making a total of \$5,119.10.

The evidence offered by claimant established that the foregoing damages were the result of the unreasonable delay in vacating the 29 buildings wrecked by claimant subsequent to June 1, 1951. The evidence established that it expended 13,276 man hours for the period of June 1, 1951 to June 1, 1952 at an increased labor cost of 15¢ per man hour, due to the fact that claimant was required to enter into a subsequent labor contract at an increased rate over that in effect at the time of the bidding on the demolition project. The evidence further established that claimant expended an additional 248 man hours subsequent to June 1, 1952 at a total increased labor cost of 35¢ per man hour, making a total increase in necessary labor cost of \$2,741.80. Because of the unnecessary delay in making the buildings available for wrecking, waste material accumulated from persons dumping debris into the buildings, which claimant was required to remove under the terms and conditions of the executed contract. The evidence established that the cost of labor in removing this material was greatly increased, because of the unreasonable delay, over what it would have been had the buildings been made available on schedule under the terms of the contract. The evidence established that the increased cost of removing this material was \$874.00.

The Workmen's Compensation, Public Liability and Property Damage Insurance premiums, which were based upon the total wages paid to the employees at the rate of 17% of the payroll, were likewise increased by reason of the delay and resulting higher labor costs. The evidence established that this extra cost to claimant was \$559.30.

There is no dispute that claimant is entitled to \$944.00, being an amount of 10% of the total contract withheld by respondent.

We believe that claimant is entitled to an award in the amount of \$5,119.10. It is, therefore, ordered that claimant's claim in that amount, be allowed.

(No. 4786—Claimant awarded \$5,000.00.)

SUE MAMMEN, Claimant, *vs.* STATE OF **ILLINOIS**, Respondent.

Opinion filed May 23, 1959.

COSTIGAN, WOLLRAB AND YODER, Attorneys for Claimant.

LATHAM CASTLE, Attorney General ; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—duty to warn public. State is under duty to give warning by the erection of proper and adequate signs at reasonable distances of a dangerous condition of which the State had notice either actual or constructive.

SAME—notice of barricade. Evidence showed respondent was negligent where only notice of barricade was a sign bearing the legend "No Outlet", which was located one-half to three-quarters of a mile from end of pavement and barricade.

WHAM, J.

Claimant, Sue Mammen, brings this action for damages growing out of injuries to her person, which were sustained on December 26, 1956 when the automobile driven by her husband, in which she was a passenger, collided with a barricade marking the end of the pavement on old Route No. 66 southwest of Gardner, Illinois, as they were enroute to their home in Danvers, Illinois, returning from a Christmas visit with their son and family in Elmhurst, Illinois.

She sustained facial injuries and a broken kneecap necessitating the removal thereof by surgery, and claims damages in the amount of \$7,500.00.

Claimant contends that respondent was negligent in failing to sufficiently warn the traveling public of the barricade's existence, and the fact that the road came to a dead end.

Respondent's position is that reasonable warning was given to the public of such condition, that claimant and her husband should have seen the barricade, and that the evidence failed to establish respondent guilty of any act or omission, which proximately caused the injuries to claimant.

The record reflects very little conflict in the evidence. Basically, the facts are these : Claimant's husband, Ernest William Mammen, 75 years of age, was driving a 1946 Mercury automobile in which his wife, claimant, Sue Mammen, 73 years of age, was riding as a passenger in the front seat at the time of the accident in question. They had been to Elmhurst to visit their son, Dr. William Mammen, for Christmas, and were returning to their home in Danvers, Illinois.

They had traveled from Elmhurst to Gardner, Illinois on the State highway referred to by the parties as "Old 66". This route formerly ran south and west of Gardner, Illinois. However, in the fall of 1956 that portion of "Old 66" south and west of Gardner was closed, and a new four-lane Route No. 66 was opened.

North of Gardner this road, referred to as "Old 66" through Braidwood and Alternate Route No. 66 through Joliet, could be used as well as the new four-lane highway. South and west of Gardner only the new four-lane Route No. 66 could be used.

The State had closed that portion of "Old 66" by removing part of the slab, and also erecting a barricade across the highway south and west of Gardner. The barricade extended from the east side of the shoulder on

the east to the west side of the shoulder on the west. It consisted of 6 inch I-beams set in the ground at intervals of 12 feet 6 inches with a 12 inch convex steel plate fixed horizontally to the northerly side of the I-beam. The barricade was 63 feet long, 24 inches high, and was painted white.

At the southwest edge of Gardner there is access to the new U. S. No. 66 from the "Old 66" at a four-way stop sign. A short distance south thereof there is a "Y", one branch leading to an overpass over the G. M. and O. R. R. going back to the north toward Joliet, and the other branch being a continuation of old U. S. Route No. 66 south to the place where the barricade now marks the ending of the old route.

Claimant's husband, after stopping at the four-way stop sign at the access road from "Old 66" to the new Route No. 66, proceeded on across the intersection, and made a left turn at the "Y" leading over the railroad tracks. After traveling a short distance, he realized that he was on the Alternate U. S. No. 66 heading back north. He then backed his automobile to the fork, and continued southerly on "Old Route 66".

Approximately 50 feet from the "Y" there was a sign reading "No Outlet". This sign was located approximately one-half to three-quarters of a mile north and west of the barricade. There was no sign indicating that the road was barricaded. The "No Outlet" sign was partially covered by snow.

The weather on that day was bright and clear, and snow covered the ground. As claimant and her husband approached the barricade between 40 and 45 miles an hour, they suddenly saw the barricade in front of them. Claimant's husband attempted to stop the vehicle, but was unable to do so, and crashed into the barricade.

Claimant struck the windshield of the vehicle and numerous other parts thereof. She received facial cuts and a broken kneecap. The kneecap was subsequently removed in its entirety by surgery due to the shattering nature of the fracture. Claimant was taken to the Morris Hospital, and was later removed to the Elmhurst Hospital, so that her son, who was a physician, could take care of her. She was immobilized for six weeks in a metal splint, and was in the home of her son for seven weeks before she was released to go back to her home in Danvers. Claimant contends that, because of the injury to her knee, it has been impossible for her to do numerous household chores both inside and out, and she is unable to carry on the active life, which she lived prior to the accident.

Mr. Arthur Bozue, a witness offered on behalf of claimant, testified that he operated a service station at the intersection of Route No. 66 and the blacktop road on the outskirts of Gardner. He accompanied the ambulance driver to the scene of the accident, and gave first aid to claimant. He testified that the barricade in question was located 30 inches off of the pavement, and was painted solid white. He noted the "No Outlet" sign as they returned from the scene of the accident in the ambulance, and observed that the sign was not visible, because it had snow on the face of it. He further testified that, as they approached the scene of the accident in the ambulance, they had a great deal of difficulty seeing the barricade, due to the glare created by the sunshine upon the snow, and, in fact, the ambulance driver nearly struck the barricade before coming to a stop. He stated that there was some snow on the highway around the barricade, and that he saw skid marks of 25 or 30 feet made

by the Mammen automobile immediately before it hit the barricade.

Mr. Kenneth Sandeno, the ambulance driver, offered as a witness on behalf of claimant, testified that he took Mrs. Mammen to the Morris Hospital. He also stated that, he could not see the barricade until he was right on top of it; that this was due to the reflection of the sun upon the snow. He said there was some snow on the road, and that the unpaved ground in back of the barricade was covered with snow. He verified the fact that the barricade was painted white. He stated he could not read the "No Outlet" sign, because it was covered with snow.

Dr. William Mammen testified that he cared for his mother in conjunction with Dr. D. G. Michels. He testified that claimant had made a fairly normal recovery, and has full flexion of the knee; but she tires, has some weakness in the knee, and uses a cane by reason thereof. His services rendered reasonably amount to \$150.00; the hospital bill was \$152.15; the ambulance service from Morris to Elmhurst was \$40.00; and, Dr. Michels' charge for the operation in removing the kneecap was \$300.00.

Respondent made some attempt to show that claimant's husband, Mr. Mammen, told Mr. Arthur L. Dierstein, a District Traffic Engineer for the Department of Highways, State of Illinois, that he saw the "No Outlet" sign and slowed up, and that he was referring to a time immediately prior to the accident. Mr. Mammen admitted telling Mr. Dierstein that he had seen the "No Outlet" sign, but testified that he was referring to seeing it after the accident rather than before the accident, when it was pointed out to him by Mr. Bozue, as they came back from the scene of the accident. I~~E~~ also testified that he had traveled that route for many years before the construction of the new highway, and had no knowledge of

the pavement's removal, or of the existence of the barricade prior to the accident.

From all the evidence in this case, we find that respondent was negligent in failing to properly inform the motoring public of the barricade's existence and the dead end of the road. Regardless of whether Mr. Mammen saw the "No Outlet" sign or whether he did not, that sign was clearly inadequate as a warning that he would be confronted with a low barricade, which blended into the landscape, and could not be readily seen in time to avoid colliding with it. The evidence clearly reflects that no warning of any kind was given by respondent as to the existence of this barricade.

This situation comes within the purview of *Bovey vs. State of Illinois*, 22 C.C.R.95, wherein we allowed a recovery based upon the insufficiency of the signs to warn the motoring public of a particularly dangerous condition. The rule there announced is that, although the State is not an insurer of the safety of persons in the lawful use of its highways, it is nevertheless under a duty to give warning by the erection of proper and adequate signs at a reasonable distance of a dangerous condition of which the State had notice either actual or constructive. We hold that, under the conditions involved in this case, a sign stating "No Outlet" is wholly insufficient to advise the motoring public of the barricade involved and the abrupt ending of a State highway. Respondent was negligent in failing to maintain adequate signs warning of this particular danger, which obviously was known by it to exist long prior to the happening of this occurrence.

We further find that claimant and her husband were in the exercise of ordinary care for their own safety at

the time of this occurrence, and that the negligence of respondent proximately caused claimant's injuries.

As to the amount of damages, the Commissioner observed claimant, and recommended that she be awarded the sum of \$5,000.00 for her injuries. Although it was necessary to remove the patella, the evidence fails to reflect any great limitation of a permanent nature resulting; therefrom, and, therefore, we will adopt the Commissioner's recommendation as to the amount of damages, since he had the opportunity of observing claimant personally.

An award is, therefore, made to claimant in the amount of \$5,000.00.

(No. 4854—Claimant awarded \$7,375.50.)

THE COUNTY OF RANDOLPH, Claimant, **vs. STATE OF ILLINOIS**,
Respondent.

Opinion *filed* May 23, 1959.

WILLIAM A. SCHUWERK, Attorney for Claimant.

GRENVILLE BEARDSLEY, Attorney General; **ROGER LAPAN**, Assistant Attorney General, for Respondent.

COUNTIES—*reimbursement* for *writs* of habeas corpus *in forma pauperis*. Upon stipulation of facts and expenses, an award was entered pursuant to Ill. Rev. Stats., 1957, Chap. 65, Secs. 37-39; and Chap. 37, Sec. 439.8.

TOLSON, C. J.

The County of Randolph has filed a claim seeking an award in accordance with the statutory provisions of Chap. 65, Pars. 37, 38 and 39, Ill. Rev. Stats., 1957.

The claim was heard by Commissioner Billy Jones,, and his report, in the following words and figures, is hereby adopted by the Court:

"This case is a claim for filing fees, service fees, and State's Attorney's fees in certain habeas corpus cases filed by inmates of the Illinois State Penitentiary at Menard, Randolph County, Illinois between the dates of

December 20, 1956 and December 18, 1958, inclusive. The matter was heard on May 18, 1959 at Chester, Illinois. No testimony was offered, but an agreed statement of facts is contained in a stipulation filed with the Court. Your Commissioner appeared at Chester, Illinois on May 18, 1959, and examined the records and books in both the offices of the Circuit Clerk and the State's Attorney, and found that these books and records substantiated claimant's list of filing fees, sheriff's fees, and State's Attorney's fees, which is set forth in claimant's exhibit A. He also found each case numbered and docketed in order with figures for the respective fees.

Similar claims have been filed with the Court of Claims, and have been allowed, as can be noted in an opinion filed March 31, 1953, 21 C.C.R. 427, and in an opinion filed on June 24, 1955 in case No. 4664. The total amount of the present claim is \$7,375.50, as set forth in claimant's exhibit A.

OBSERVATIONS

My examination of the records found everything to be in order to substantiate claimant's claim.

CONCLUSION

Claimant has a just claim, which should be paid.

RECOMMENDATION

Commissioner recommends that the sum of \$7,375.50 be allowed The County of Randolph, as prayed in the complaint."

An award is, therefore, made to The County of Randolph in the amount of \$7,375.50.

(No. 4863—Claimants awarded \$268.68.)

ARLENE M. GLASER, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed May 23, 1959.

BERZOCK, **BLAHA** AND HYDER, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL *GUARD—negligence*. Evidence showed respondent was negligent in the operation of a National Guard motor vehicle, entitling claimants to an award.

FEARER, J.

This case involves an accident, which occurred on or about the 19th day of April, 1958 at the intersection of Kedzie and Foster Avenues in the City of Chicago, County of Cook and State of Illinois.

There is very little dispute as to the facts in this case, and this Court has waived the filing of abstract, briefs and arguments.

No answer having been filed by respondent, the laws of the Court provide that a general traverse of the allegations of the complaint will be considered.

There has been filed herein a bill of particulars, a paid repair bill for damages to claimant's car in the amount of \$268.68, and an accident report.

The Commissioner heard this case on April 16, 1959, and his report was filed on April 20, 1959. In his report the Commissioner recommended an award, and we hereby adopt it as our opinion:

"The above entitled cause was heard on April 16, 1959 in the City of Chicago. Claimant was represented by Fred C. Hyder, and respondent was represented by Lester Slott. This is a property damage claim. The total amount of the claim is \$268.68. Of this amount, claimant is entitled to \$50.00, and the United States Fidelity and Guarantee Company is entitled to the sum of \$218.68, if the claim is allowed by this Court.

It appears that on April 19, 1958 claimant ~~was~~ driving her 1957 Plymouth 2-door sedan in a northerly direction ~~on~~ Kedzie Avenue at its intersection with Foster Avenue in the City of Chicago. Robert L. Anderson, a member of the 131st Infantry, Illinois National Guard, was driving a Jeep in a westerly direction on Forest Avenue at the head of a convoy. There are stop lights at all four corners ~~of~~ the intersection. It appears that claimant proceeded across the intersection in a northerly direction. There was a car in back and in front of her vehicle. She was proceeding with the green light. It appears that Anderson proceeded into the intersection, and drove his vehicle directly into the side of the automobile of claimant. It appears that he had blown his horn before the accident. There were no Military Police present at the intersection.

Claimant introduced a paid repair bill marked claimant's exhibit No. 1. Respondent did not introduce any evidence.

It is obvious from the facts that respondent, through its agent, **Robert**

L. Anderson, was guilty of negligence, and claimant was free of contributory negligence.

It is, therefore, recommended by this Commissioner that claimant be awarded the sum of \$268.68."

It appears from the record that claimant, Arlene M. Glaser, had a collision policy with the United States Fidelity and Guarantee Company, being a \$50.00 deductible policy, and that she signed a subrogation receipt in the amount of \$218.68, being the amount she received from the United States Fidelity and Guarantee Company.

It is, therefore, ordered that an award be made to Arlene M. Glaser in the amount of \$50.00.

It is, therefore, ordered that an award be made to the United States Fidelity and Guarantee Company in the amount of \$218.68.

(No. 4678—Claimants awarded \$5,000.00.)

PAUL DILLARD AND BERTHAL DILLARD, HIS WIFE, AND KEITH DILLARD, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1959.

FRANK E. TROBAUGH AND STEPHEN E. BRONDOS, Attorneys for Claimants.

GRENVILLE BEARDSLEY, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—consequential damages—change of grade level. Evidence showed that claimants were damaged by the change in the grade level of the highway, which changed the water course so as to flood claimants' property.

JURISDICTION—consequential damages by reason of Public improvement. Court has jurisdiction to make an award under Sec. 8A of the Court of Claims Act for consequential damages arising out of a public improvement.

TOLSON, C. J.

The claimants in this case seek consequential damages under Article II, Section 13, of the Illinois Constitution.

The claim is based upon the following facts:

Paul and Berthal Dillard are the owners of certain real estate, which is located at the southeast corner of State Route No. 149 and Pershing Road near West Frankfort, Illinois. The real estate is improved with a filling station near the junction of the road, and a rent house to the west, which fronts on Pershing Road. Paul Dillard's home lies to the east of the filling station on Route No. **149**. The filling station, itself, is owned by Keith Dillard, and was placed on the land under lease from Paul Dillard.

During the Fall of 1952 and the Spring of 1953, the State raised the grade of Route No. **149** and Pershing Road approximately two feet. Prior to that time, an open ditch ran along both sides of Route No. **149** and the east side of Pershing Road, so that the surface water was readily carried away.

Under the new improvement, the crown of Route No. **149** was removed, and the road was widened about ten feet. The grade was changed, so that the water coming from the east was drained to the south and west. The ditch was removed, and a conduit was put in its place.

It appears from the evidence that the conduit did not take the place of the open ditch, and, as a result, storm water would run down the road, cross over and upon the filling station, then head in a southwesterly direction upon the rent house. The photographs, introduced in evidence, showed conclusively that the area was virtually a pond until the water could drain away.

The rent house was uninhabitable during the rainy season, as the basement would flood. Paul Dillard testified that he was obliged to replace a furnace, which had rusted out.

Claimants allege that, as a result of the improvement, they will be obliged to raise all of the buildings about two feet, haul in fill, and replace pipes, tanks and fittings.

Under Section 8A of the Court of Claims Act, the Court has jurisdiction to hear and determine claims for consequential damages to property arising out of the construction of public improvements. *Tenboer vs. State of Illinois*, 21 C.C.R. 353.

The evidence establishes damage beyond any argument. However, the proofs as to the amount are in conflict. Both of the claimants have agreed to accept a gross award and to apportion the amount among themselves, so that this Court will not be obliged to make separate awards.

From the evidence, the Court finds that claimants have suffered damages in the amount of \$5,000.00.

An award is, therefore, made to Paul Dillard, Berthal Dillard and Keith Dillard in the amount of \$5,000.00.

(No. 4686—Claim denied.)

PAUL I. HOWELL, AS ADMINISTRATOR OF THE ESTATE OF LUELLA HOWELL, DECEASED, Claimant, **vs.** STATE OF ILLINOIS, Respondent.

Opinion fled May 12, 1959.

Petition of claimant for rehearing denied July 24, 1959.

BROWN, HAY AND STEPHENS, AND DUNKELBERG AND RUST, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent,

CONTRIBUTORY NEGLIGENCE—*burden of proof.* The burden of **proof** is **upon** claimant to show freedom from contributory negligence, and, where he fails to meet **such** burden, his claim will be denied.

HIGHWAYS—maintenance of shoulders. The State is not bound to maintain shoulders in the same condition as the paved surface of its highways.

SAME—duty of operators to keep vehicles under control. It is the duty of the operators of motor vehicles to keep their vehicles under control, and failure to do so would amount to negligence.

FEARER, J.

Paul I. Howell, as Administrator of the Estate of Luella Howell, deceased, filed his claim against the State of Illinois for the wrongful death of his wife, as the result of an accident, which occurred at or about the hour of 10:30 A.M. on September 7, 1954 on highway No. 88 at a point approximately one-half mile north of the junction of Route No. 93, west of the town of Bradford, in the County of Stark.

Mrs. Howell left as her sole and only heirs at law, her husband, Paul Howell, and her son, Clifford Yanda.

Mrs. Howell was riding in the right front seat of the automobile owned and driven by Mr. Howell, being a 1954 Plymouth Club Coupe, in a southerly direction on State Route No. 88. At the time it was misting, and the pavement was wet.

Mr. Howell was driving his automobile at approximately 60 m.p.h. There was an automobile traveling in the same direction, and Mr. Howell turned out to pass this automobile. In returning to the southbound traffic lane, the right front and rear wheels ran off onto the shoulder. Mr. Howell was traveling at approximately the same rate of speed, and his car continued on 15 or 20 feet until the right front wheel struck an obstruction along the shoulder of the road. The obstruction was referred to as tar and was 2 to 3 inches below the paved portion of the highway. This had gathered along the side of the road or shoulder, as a result of tar being placed in the expansion joints. There were slight depressions along the shoulder, which were below the paved portions, and

had been caused by a washing of the shoulder and trucks traveling off of the highway onto the shoulder.

Mr. Howell, in attempting to regain control of his car and turn back onto the concrete, went diagonally across the pavement to the east side of the road, and struck the embankment. Mrs. Howell received injuries from which she died within a very short time.

This was an 18 foot concrete pavement with shoulders on each side 6 feet in width. The highway was level, and there were slight depressions from the edge of the pavement to the earth shoulders.

There appears to be no explanation as to why Mr. Howell drove his car off onto the shoulder after passing the car immediately in front of him. The fact remains that he did lose control of his automobile in driving back onto the right side of the road and then running onto the shoulder, as a result of which his car went out of control and struck the embankment on the east side of the road.

Mr. Howell explained how he endeavored to gain control of the automobile. From the distance the car traveled, it appears that he was driving at an excessive rate of speed, which may have been the cause of his car running off onto the shoulder; or it may have resulted from his actions in trying to pass the car in front of him, and return to his proper trafficlane. This road was familiar to Mr. Howell, as he had driven over it many times.

The evidence offered by claimant, other than his own testimony, was furnished by two other witnesses, who saw the Howell car just before the accident. They testified that the car did go out of control, traveled diagonally across the road, and struck the embankment. None of them, however, were able to explain why claimant's car ran off onto the shoulder, other than the fact that the

pavement was wet and there was a patch of asphalt on the west shoulder.

The only other witness testifying was Mr. Martin, a state policeman, who made two reports of the accident, which throw very little light on this case. There was a discrepancy between the two reports, which we believe is not material, as there appears to be no question but what there was an accumulation of tar or asphalt in a depression or groove in the shoulder at the west edge of the pavement, and a lip of such tar or asphalt for a short distance from the west edge of the pavement out to the earth and grass shoulder. Photographs were offered in evidence, which show the height between the shoulder and the paved portion, and the accumulation of asphalt.

There is no question but what Route No. 88 at the time of the accident was under the jurisdiction of respondent, and was maintained by its employees. Furthermore, there is no question but what the shoulder was lower than the paved portion of the road, and that asphalt had oozed out of the expansion joint and accumulated along or near the depression and ruts running parallel with the highway.

Claimant is predicated his case on the condition of the shoulder, failure of the State to warn the traveling public of such condition, and failure to maintain the shoulder along the highway in a better condition.

Respondent not having filed an answer, a general traverse under our rules is considered.

Respondent's principal defense is the contributory negligence of Paul I. Howell in driving and operating his automobile in which Luella Howell was riding as a passenger as being the proximate cause of the accident resulting in her death.

We have previously held that the State is not an insurer of all persons traveling upon its highways. (*Neil Beenes vs. State of Illinois*, 21 C.C.R. 83; *Terracino, Et Al, vs. State of Illinois*, 21 C.C.R. 177; and, *Riggins vs. State of Illinois*, 21 C.C.R. 434.)

We have had other claims involving the shoulder of a highway, and have previously held that respondent is not bound to maintain the shoulder in the same condition as the paved surface. (*Sommer, Et Al, vs. State of Illinois*, 21 C.C.R. 259.)

It is the duty of operators of motor vehicles to keep their vehicles under control, and failure to do so would amount to negligence.

The burden of proof is upon claimant to prove freedom from contributory negligence, and that it was the negligence of respondent, which was the proximate cause of the accident in question and resulting damages. The record is silent as to the question of freedom from contributory negligence. From the record, as it now appears, it was the negligence of the operator of the car, which was the proximate cause of the accident, and not the negligence of respondent or its agents.

The claim of the Administrator, Paul I. Howell, for the death of Luella Howell is hereby denied.

(No. 4797—Claim denied.)

JAMES F. SINCLAIR, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion fled May 23, 1959.

Petition of claimant for rehearing denied July 24, 1959.

WESNER AND PLATER, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—status of *convict*. A convict is not an employee. Injuries to convicts are governed by common law rules of negligence.

SAME—contributory negligence. Where evidence showed convict fell from a ladder, which did not collapse or break, claimant was guilty of contributory negligence and not entitled to recover.

FEARER, J.

James F. Sinclair filed a complaint in this Court on December 2, 1957, and an amended complaint on January 14, 1958, seeking damages for personal injuries sustained by him on December 4, 1956, while he was an inmate of the Illinois State Penal Farm at Vandalia, Illinois, having been committed there through an order of the County Court of the County of Crawford and State of Illinois.

The record consists of the following :

1. Complaint
2. Amended complaint
3. Order for physical examination of claimant
4. Departmental Report
5. Transcript of evidence
6. Respondent's exhibits Nos. 1 and 2
7. Respondent's x-ray exhibits Nos. 3 and 4
8. Statement, brief and argument of claimant
9. Statement, brief and argument of respondent
10. Reply brief of claimant
11. Commissioner's Report

The facts in this case are brief. The only occurrence witness testifying as to what transpired on the date of the accident, when the personal injuries were sustained, was claimant.

On December 4, 1956, claimant, who had some experience in plumbing, was ordered to insulate a hot water tank in the basement of the boiler room of the Institution by lacing chicken wire around it. He was furnished with a ladder, which consisted of three steps, including the top step, the rear of which was perpendicular. This type of ladder was primarily used by older inmates in the dormitory in getting into the upper bunks, but was

also used in and about the Institution for other purposes. It was approximately 29½ inches high, but was not a collapsible or adjustable ladder. Pictures of said ladder were attached to the Departmental Report, and are referred to as respondent's exhibits Nos. 1 and 2. Another inmate was also working on the opposite side of the tank, which was being insulated.

The hot water tank was one of 55 gallon capacity, and was 6 feet above the floor. There is some question as to whether or not the concrete floor beneath the tank was wet at the time claimant was working. The water tank was above his head while he stood on the ladder, and he was working with his hands above his head at the time.

The negligence charged on which this claim is predicated is that the ladder was not an ordinary stepladder, but that such ladder was used primarily for the purpose of inmates getting into the upper bunks at the Institution. The back of said ladder was perpendicular, and could not be adjusted to compensate for someone attempting to use the same in and about the insulating of a hot water tank, or, in other words, that the ladder was dangerous when used on a slippery wet floor. The complaint alleges that, as a direct and proximate result thereof, claimant fell to the floor, and sustained injuries to the left side of his body, head and shoulder, as well as a fractured wrist, commonly known as a Colles' fracture.

Claimant contends that he was an employee under the provisions of the Health and Safety Act, and that there would be no question of contributory negligence in a case of this kind. Authorities in support thereof are cited, some of which are Federal Employers' Liability cases.

We have had occasion to pass on questions similar to those presented us in this case, i.e., *Moore vs. State of Illinois*, 21 C.C.R. 282 at 288; *Sparacino vs. State of Illinois*, 22 C.C.R. 571 at 573, wherein this Court held that a convict is not an employee, and that cases of this kind fall under the common law rules of ordinary negligence.

Claimant, being an inmate, must prove by a preponderance or greater weight of the evidence that the injury, which he sustained, was primarily caused by some overt negligence on the part of the State before he can recover. *Allen vs. State of Illinois*, 21 C.C.R. 450.

We have also previously held that the contributory negligence of an inmate of a penal institution will bar recovery for an injury, which he sustained. *Moore vs. State of Illinois*, 21 C.C.R. 282.

The type of ladder in question, which was used by the State, did not collapse or break, and thus cause claimant to fall. There is no claim or proof on behalf of claimant that a condition existed, which caused claimant to fall. In fact, it does not appear in the record how claimant fell off of the ladder, and to find the State negligent and claimant free from contributory negligence would necessitate speculating that, because claimant fell from a ladder of the type in question, the State was negligent. Whether claimant improperly placed the ladder underneath where he was working, or whether he leaned too far forward, which would cause him to be insecure on the ladder, and could result in his falling therefrom, is not disclosed. If this was the case, of course, he would be guilty of contributory negligence, which would bar him from recovery. In any event, we do not think that claimant has sustained the burden of proof, which he would be required to sustain in a case of this kind. Under the authorities cited herein by respondent, and under the

rules of common law negligence, we will have to deny the claim.

An award to claimant, therefore, must be and is hereby denied.

(No. 4798—Claim denied.)

MARY BARRETT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 24, 1959.

KEVIN D. KELLY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; **SAMUEL J. DOY**, Assistant Attorney General, for Respondent.

HIGHWAYS—pedestrian traffic. The State is not under a duty to maintain an entire highway, so that it will be safe for pedestrian traffic.

SAME—traversing highway at points other than crosswalks. Where claimant was injured in fall while crossing the highway at a point other than an intersection or crosswalk, she is not entitled to an award.

CONTRIBUTORY NEGLIGENCE—evidence. Evidence showed that claimant, who failed to see hole in pavement on a sunny day, although there were no obstructions to her view, was guilty of contributory negligence.

WHAM, J.

Claimant, Mary Barrett, brings this action to recover \$7,500.00 in damages for injuries to her person, which she sustained on November 21, 1956 in a fall on the public highway in Utica, Illinois, while crossing from the east to her home on the west side of Illinois State Route No. 178.

The facts are relatively undisputed, and are as follows :

Mary Barrett, claimant, was 67 years of age at the time of the hearing. She is a widow, and resides with her two sisters in a house about four blocks south of the business district of Utica, Illinois. The house is on the west side of Illinois State Bond Issue No. 178, and is within the city limits of Utica. There are houses on both sides of the road in the vicinity of the accident.

The day on which the accident occurred, November **21**, 1956, was clear and, bright. About 11:00 A.M. on the aforesaid day, claimant had gone to the business district in Utica to do grocery shopping for the household. She obtained her merchandise, and placed it in a shopping bag with a handle on it.

She walked in a southerly direction along the easterly side of the highway to a point **30** to 70 feet north of the place of her residence. When the traffic permitted, she crossed over the highway. On the westerly half thereof she stepped into a hole about 8 inches by 18 inches in size, and $2\frac{1}{2}$ to 3 inches in depth. She did not see the hole before she stepped into it, but looked back after she fell and was being carried off the pavement. The hole was also described by the person, who carried her off the pavement.

According to claimant, she was looking ahead, did not see the hole, and didn't know it was there until she caught her heel. Mr. Snell was called by Mr. Fitzgerald to aid in carrying claimant to her home. The witness Snell, who knew Mrs. Barrett very slightly, stated the hole was **24** inches long by 12 inches wide, and 2 or **3** inches deep. The hole was near the west edge of the highway. This witness drove highway No. 178 about once a week. He said that the road was in a very choppy condition in this area. He stated that he did not notice any loose concrete or gravel near this hole, and that, therefore, in his opinion, the hole was not fresh. He estimated it to be a couple of months old. According to Mr. Snell, claimant was lying very close to the hole, which had caused the fall.

Following the removal of claimant from the highway by Mr. Snell, she was taken to the Ryburn-King

Hospital in Ottawa, Illinois, where she was placed under the care of Dr. H. E. Stewart, who took x-rays. The doctor determined that there was a fracture of the left leg at the upper end of the femur, just below the head thereof. A cast was applied to both legs, and claimant was in a full hip and leg cast for a period of about 2½ months. After the cast was removed, therapy was applied, and claimant was released from the hospital on February 22, 1957. She was on crutches for a period of six weeks after her release from the hospital, and thereafter she used a cane for a number of weeks. On the day of her last examination by Dr. Stewart, which was June 27, 1957, and also at the date of the hearing, May 12, 1958, claimant walked with a limp. Dr. Stewart described the limping condition as permanent. In Dr. Stewart's opinion, claimant sustained a 20% loss of motion in the hip joint. In addition to the fracture, claimant suffered considerable pain. According to the doctor, claimant, due to shock, was mentally confused for several days after the accident. Claimant's hospital bill amounted to the sum of \$1,417.30, and her doctor bill was \$150.00. In addition to the aforesaid medical expenses, claimant paid \$10.00 to the Hulse Funeral Home, \$10.00 to Gladfelters, and \$41.00 for eye glasses, which were broken in the accident. At the time of the accident, claimant was employed as a housekeeper by her sisters at the rate of \$20.00 per week, plus her room and board.

From these facts we conclude that claimant is not entitled to recover for two reasons:

First, the facts do not establish a duty upon the State to maintain that particular portion of the highway for pedestrian travel. Although it is true that the State and municipalities must maintain crosswalks at inter-

sections in a reasonably safe condition for pedestrian travel, it does not follow that either the State or municipalities must maintain the entire public highway under their respective jurisdictions in the same manner and condition that a sidewalk or crosswalk should be maintained. To so require, would be to place an impossible burden upon the State and municipalities.

This accident did not occur on a sidewalk or crosswalk. It occurred at a point in the highway nowhere near an intersection. This hole was located on Illinois State Route No. 178, and was several blocks from the business district of Utica, Illinois. There is no evidence that the point at which the accident occurred was more likely to be used by pedestrians than any other part of the highway outside of the business district. Although there is a showing that residences were located on either side of the highway, it is no less true that, throughout the highway network of the State, farm homes lie across the road from one another. The fact that the State could reasonably assume that people would cross the road to visit one another is no more reason for the State to be required to maintain the highway as a sidewalk at the point of the accident, than it would lie to so maintain the highway throughout the rural areas of Illinois.

Likewise, the fact that claimant had a right to walk anywhere on the State highway, which she chose in going to and from market, does not place a duty upon the State to prepare the way for her as a pedestrian.

Utica is a village of approximately one thousand persons. What would be reasonable to require of the State or a municipality in a large city is not the test here

In the case of *Boender vs. City of Harvey*, 251 Ill. 228, at pages 230 and 231, the court stated:

“* * * Municipal corporations are not insurers against accidents. The object to be secured is reasonable safety for travel considering the amount and kind of travel, which may fairly be expected upon the particular road or street. A highway in the country need not be of the same character as a street in a large city. (*Mohway vs. City of Chicago*, 229 Ill. 486.) * * * only duty cast upon the city is that it shall maintain the respective portions of the street in a reasonably safe condition for the purposes to which such portions of the street are devoted.”

Claimant cites no case that places a duty upon the State to maintain the entire street for pedestrian traffic. The case of *Graham vs. City of Rockford*, 238 Ill. 214, relied upon by claimant, involved a crosswalk at an intersection.

The case of *Maxey vs. City of East St. Louis*, 158 Ill. App. 627, also relied upon by claimant, was one wherein the pedestrian was injured when she stepped from a street car to the public street. The court in that case held that the city was under a duty to maintain that portion of the street for pedestrian travel, inasmuch as the city had granted the street railway company a franchise and street privileges, and had, therefore, devoted such place at which the pedestrian would alight from a street car for use by pedestrians. At page 630, the court stated:

“* * * To hold otherwise would deprive the public of the use of street cars, or compel them to alight and walk on the street at such places at their own risk without regard to whether or not they were reasonably safe for such use.”

The court recognized the distinction between the situation presented there, and that presented in the instant case. At pages 629 and 630, the court stated:

“It is insisted by the appellant that there is no liability against the city in this case, because the hole or depression was not in any sidewalk or crossing of the city, and that it is under no legal obligation to keep the driveway of its street longitudinally in a fit and safe condition for pedestrians. It was said in substance in *City of Aurora vs. Hillman*, 90 Ill. 61, and in *The Pres. and B'd. of Trustees of Harvard vs. Senger*, 34 Ill. App. 223, that a city is not bound to keep its whole street fit and safe for foot passengers. If *this* must be accepted as the general rule of law, still we think that under the holding of our courts that there are exceptions to the rule. A city may

reserve portions of a street for pedestrians, portions thereof for the use of vehicles only, and portions thereof for both pedestrians and vehicles. Sidewalks are usually made for pedestrians only, and street crossings for both pedestrians and vehicles. Cities are required to use reasonable care to keep street crossings in a reasonably safe condition for pedestrians while in the exercise of reasonable care and caution. This is not denied by appellant. The true rule in all cases, we think, is that a city is only required to maintain the respective portions of its streets in a reasonably safe condition for the purposes to which they are respectively devoted by the intention and sanction of the city. *Kohlhof vs. The City of Chicago*, 192 Ill. 249; *Town of Normal vs. Bright*, 223, Ill. 99; *City of Beardstown vs. Smith*, 150 Ill. 169."

In *City of Aurora vs. Hillman*, 90 Ill. 61 at page 64, the Supreme Court stated:

"* * * The sidewalk was intended for foot passengers, and the carriage-way in the street was intended for horses and vehicles. It is true that pedestrians would have a right to cross over the street or road, and their right to do so, at least at the usual street crossings, would be equal to that of persons with teams to drive along the street, and cities are bound to keep such crossings in a safe condition; but we are not prepared to hold a pedestrian has an equal right with one who drives a carriage to travel in and along the driveway of a public street, or that a city is under any obligation to keep such driveway, longitudinally, in a fit and safe condition for pedestrians."

Under the evidence in this case, we find that the State did not owe the duty to claimant, as a pedestrian, to maintain the street at the point where she crossed for pedestrian travel.

Secondly, claimant has failed to establish that she was in the exercise of ordinary care for her own safety at the time of her injury. If the hole was as large as she and her witness stated it to be, then there appears to be no good reason why she should not have seen it prior to stepping in it.

It was a sunny day, she was not hindered in seeing the hole by anything, she had traveled practically the entire width of the road before stepping into the hole, and she had traveled the particular route almost every day prior to the injury over an eight year period.

She was not looking at the pavement, as she walked across the road. There was no particular reason why she

crossed the highway at a point some 30 to 70 feet north of her residence, which was the location of the hole. There was more than sufficient space between the place she did cross and her home for her to have walked in safety had she given attention to selecting her path.

Although it was not negligence per se for claimant to cross at the place she did, and although the Supreme Court of this State in *Swenson vs. City of Rockford*, 9 Ill. (2d) 122, held that the question of contributory negligence in such an instance would probably be one for the jury to determine rather than as a matter of law, as counsel points out in claimant's brief, we believe that, taking all of the facts and circumstances into consideration, claimant should have observed this hole in the road and avoided it.

By not doing so, we feel that the facts in this case indicate that by her own lack of due care claimant proximately caused her injury.

For the above reasons, the claim is hereby denied.

(No. 4818—Claim denied.)

KROGER COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 24, 1959.

GILLESPIE, BURKE AND GILLESPIE, Attorneys for Claimant.

GRENVILLE BEARDSLEY, Attorney General; ROGER D. LAPAN, Assistant Attorney General, for Respondent.

TAXES, FINES AND LICENSES—*voluntary payment*. Where funds are voluntarily paid to State under a mistake of fact or law, they cannot be recovered unless a statute expressly authorizes it.

SAME—1957 *amendment—insurance companies*. Amendment authorizing insurance companies to recover taxes voluntarily paid does not extend jurisdiction to include all licenses or taxes wrongfully paid.

FEARER, J.

Kroger Company, A Corporation, filed its claim for \$395.00, as the result of a payment of \$5.00 for each store located in the State of Illinois for the privilege of dealing in eggs in the State of Illinois. This was done in order to obtain a license pursuant to Chap. 56½, Sees. 7-8, 1957 Ill. Rev. Stats., the license being one issued by the Department of Agriculture.

On October 31, 1957, the Department of Agriculture issued to claimant 73 Class One (I) licenses for the stores mentioned in paragraph 4 of the complaint filed herein.

Claimant alleges that, prior to the payment of the license fee in question, it was led to believe, and it was so represented by a duly authorized agent of the Department of Agriculture that each of claimant's stores mentioned in paragraph 4 was required to obtain a Class One (I) egg license pursuant to Sec. 7, Chap. 56½, 1957 Ill. Rev. Stats.

It is further alleged that, subsequent to the payment in question, claimant learned for the first time that it had mistakenly made the payment in question in that it did not buy or obtain eggs from a producer, as was contemplated by Sec. 8 of Chap. 56½, 1957 Ill. Rev. Stats. It is further alleged that, subsequent to the payment in question, claimant presented its claim to the Department of Agriculture of the State of Illinois, and the payment by mistake was acknowledged at said time by representatives of the Department of Agriculture.

It is further alleged that during the year of 1957 each of the stores mentioned in paragraph 4 of the complaint sold eggs only at retail, and obtained all of their eggs and now obtain all of their eggs from the Kroger Division Warehouse located at 8235 Vincennes Avenue, Chicago, Illinois; that said warehouse

was at all times mentioned herein a licensed wholesale distributor of eggs for claimant, and at no time was nor is it now a producer for sale at retail.

The record in this case consists of:

1. Complaint
2. Motion of respondent to dismiss
3. Statement, brief and argument of respondent in support of the motion to dismiss

No answer having been filed, under Rule 11 of this Court a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

Respondent moves to dismiss the complaint and claim presented for want of jurisdiction of the subject matter, for want of statutory authorization, and for the further reason that the monies collected were voluntarily paid by claimant, and were not paid under any mistake of fact but under a mistake of law, as appears upon the face of the complaint.

Prior to July 11, 1957, this Court had previously held that in cases of this kind it did not have jurisdiction to hear such claims under the Court of Claims Act. *Columbia Fire Insurance Company, A Corporation, vs. State of Illinois*, 22 C.C.R. 38.

In the case above cited, this Court held that, where a payment of a tax is voluntarily made, no recovery can be had for overpayment unless a specific statute authorizes such payment.

In 1957, the Court of Claims Act was amended by the addition of Par. (F) to Sec. 8.

Sec. 439.8 (F) is as follows:

"All claims for recovery of overpayment of premium taxes or fees or other taxes by insurance companies made to the State resulting from failure to claim credit allowable for any payment made to any political subdivision or instrumentality thereof. Any claim in this category, which arose after July 16, 1945 and prior to the effective date of this amendatory Act, may be prosecuted as if it arose on the effective date of this amendatory Act

without regard to whether or not such claim has previously been presented or determined.”

The addition of this paragraph permitted suits in the Court of Claims to be brought for the overpayment of taxes and fees by *insurance companies*.

The addition of this section to the Court of Claims Act, permitting recoveries on overpayments made by insurance companies, was prompted by the *Columbia Fire Insurance Company* case, as well as similar cases on overpayments of privilege taxes made by other insurance companies; and granted to the insurance companies the right to sue the State of Illinois in the Court of Claims to recover for such taxes wrongfully paid.

The section of the statute added refers specifically to insurance companies. If the Legislature had intended that it should include all licenses or taxes wrongfully paid, then the amendment to the Act should have so provided. As it is now provided, it appears that the addition to the Court of Claims Act gave this Court jurisdiction only to hear cases in regard to overpayments made by insurance companies, and does not cover overpayments by others for license fees, taxes, and the like.

This construction of the legislative intent is mandatory when one considers the maxim *expressio unius est exclusio alterius*, or the express mention of one thing is or amounts to an exclusion of all others, *I. C. R. Co. vs. Franklin County*, 387 Ill. 301. This is not a rule of law. It is merely a rule applied to assist in arriving at the real intention of the lawmakers, where such intention is not clearly manifested in the language used.

This Court previously adopted and has followed the rule of law set forth in *Whiting Paper Company vs. State of Illinois*, 13 C.C.R. 136, which has been reiterated many times. We quote from page 138:

"The rule is 'well established in this State that, where an illegal or excessive tax is paid voluntarily with full knowledge of all the facts, the same can not be recovered in the absence of a statute authorizing such recovery. *Alton Light and Traction Company vs. Rose*, 117 Ill. App. 83; *Yates vs. Royal Insurance Company*, 200 Ill. 202; *Cooper Kanaley and Company vs. Gill*, 363 Ill. 418; *American Can Company vs. Gill*, 364 Ill. 254. The rule is the same where such tax is paid under a mistake of law, but, where it is paid under a mistake of fact, it is not considered as having been voluntarily paid, and may, therefore, be recovered."

Because the Legislature did not include a provision for overpayments of fees or taxes, other than those for insurance companies, this Court would not have jurisdiction to pass upon this claim until the Court of Claims Act was enlarged by the Legislature; or, unless there was an express statute authorizing the repayment of monies voluntarily and wrongfully paid to any departmental agency of respondent.

It is, therefore, the order of this Court that the claim filed herein be denied.

(No. 4623—Claim denied.)

JOHN D. LONG, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 24, 1959.

Petition of claimant *for rehearing* denied October 2, 1959.

JOHN R. SNIVELY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; MARION G. TIERNAN, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*personal* injuries. Evidence failed to show any act of negligence on the part of respondent, which proximately caused claimant's injuries. Claimant was familiar with his assigned duties as a teamster, and had had broad experience with the animals (mules) in his charge.

SAME—duty to safeguard prisoners. State is not an insurer of the safety of inmates under its jurisdiction.

WHAM, J.

In this case, claimant, a prisoner at the Illinois State Penitentiary, was injured on May 19, 1952, while per-

forming his duties as a teamster. He claims damages in the amount of \$100,000.00, and charges in his complaint, as amended, that respondent was negligent in the following respects :

- “(a) Failed to make, promulgate and publish rules and regulations ~~for~~ the safety of claimant.
- (b) Failed to provide reasonably safe methods of work.
- (c) Failed to furnish claimant with reasonably safe tools, machinery, appliances and instrumentalities, and places to work.
- (d) Ordered claimant to labor under unsafe conditions.
- (e) Failed to instruct claimant in such labor, and to warn him **of** the dangers thereof.
- (f) Failed to provide adequate or proper safeguards.
- (g) Ordered claimant to labor without adequate or proper safeguards.
- (h) Failed to furnish claimant with adequate help or assistance.
- (i) Ordered claimant to labor without adequate help or assistance.
- (j) Failed to warn claimant of the frisky, skittish disposition of the mules.
- (k) Failed to tie **up** the cows **or** to turn them **out** to pasture while claimant cleaned the manure out of the cow shed.”

He also charges in his complaint that respondent violated the law of Illinois in requiring him to perform labor outside the walls of the penitentiary, and should, therefore, respond in damages for his injury.

The only eyewitness to the occurrence in this case was claimant. The evidence set forth in the statement of facts in claimant’s brief is as follows :

“John D. Long was a prisoner in the Illinois State Penitentiary. (Abst. 2.) He was indicted on January 13, 1944 in the Circuit Court of Winnebago County for the crime of robbery. He entered a plea of guilty on January 17, 1944, and was sentenced to a term of not less than 5 years nor more than 15 years. He was received at the Diagnostic Depot at Joliet, Illinois on February 15, 1944. He was classified for work by the Classification Board.

He was transferred to the Stateville Branch. His first assignment was on the coal pile, where he remained for about 3 years. (Abst. 3.)

He was then transferred to the Menard Branch on August 7, 1947. His first assignment was to the rock quarry, where he remained for about three years. He was next assigned to the Honor Farm on July 7, 1950. He did not make application for the work, but he signed an honor pledge. (Abst. 14.) In obedience to the orders and assignment, he entered upon the performance of the labor on the farm, which was located about 3 miles outside

the walls of the penitentiary. His first assignment was gardening, which he continued for a couple months. He was next assigned as a teamster. He was required to haul various things.

He reported for work on May 19, 1952. Roy Hams, the Superintendent, ordered him to clean the manure out of the cow shed. (Abst. 3.) He first hitched his team to a wagon, which he had used for a couple of weeks, while his wagon was being repaired. He had driven one mule for about a year, but not while any cows were in the shed. It was the first time he had used the other mule. (Abst. 18.) Nothing had been said to him about the disposition of the mules. (Abst. 13.) In addition, he had not had any trouble having them scare or run off, nor had he seen any one else have any trouble with them. (Abst. 18.)

The cow shed was a temporary building, which he had helped to build two or three months before that. It was constructed from the roof of an old garage, which had been cut into sections. They were placed on the top of posts. (Abst. 4.) The shed was approximately 45 feet in length, and a length and a half of a wagon in width. The front was open, but the ends and back were boxed in. There were no doors or partitions. The roof slanted toward the back. You could touch it with your hands at the back. (Abst. 15.) The shed was used by the cows with calves at night. (Abst. 16.)

When he arrived there, he opened the gate and drove into the yard. The cows, which were in the shed, were supposed to have been in the pasture. They were not tied up, but were loose in the shed.

He then backed the wagon into the shed. The mules and the front part of the wagon were clear of it. He next got down from the wagon. He started to load it with manure. It took him about 15, 20 minutes. The Superintendent was not there, nor was any officer or guard. (Abst. 4.) No one had shown him anything about the work, or helped him. He loaded his own wagon. When he finished, he climbed back on the seat. He discovered the cows coming out of the shed. They had come from the other end, and were right in front of him. The mules became frightened. They backed up in the shed instead of going forward. He bent over, but his back scraped against the roof. He kept yelling at the mules to go forward. They made a lunge, and started to run away. He had the lines, and raised up a little. As he did so, his shoulders struck a rafter. That is when he actually felt the pain. (Abst. 18.) He tried to stop the mules, but he was not able to do so. (Abst. 13.) He fell or was pulled down. When the wagon stopped, his hands were on the double tree, and his feet were up on the wagon. (Abst. 5.) He was not able to move. He sustained severe injuries.

He was taken to the hospital, where he was placed in traction. (Abst. 6.) He remained there 19 days, and was transferred to the Stateville Branch on June 6, 1952, where Dr. J. P. Cascino of Chicago, a neurosurgeon, examined him. X-rays revealed a dislocation of the first lumbar vertebra. Dr. Cascino performed a laminectomy on June 8, 1952.

He was discharged from the penitentiary on December 12, 1952.

(Abst. 6.) He was taken to the Dixon State Hospital, where he remained until 1954. He then came to Rockford.

He first used a wheel chair, but now uses crutches. He is paralyzed in both legs. His injuries are permanent. (Abst. 9.) He is not able to walk or work.

He was 38 years of age at the time that he was injured. (Abst. 2.) Prior to his imprisonment, he had earned \$150.00 a week in the trucking business, and \$75.00 a week in the foundry. His life expectancy, as shown by Dr. Wigglesworth's Tables, is 26.91 years. (Abst. 20.)"

Respondent agrees with this statement of facts in its brief with the exception that it sets forth additional facts appearing from the transcript, which are as follows :

"That claimant was acquainted with the habits and traits of mules since childhood (Tr. p. 78); that claimant had worked as a teamster in the penitentiary for approximately two years (Tr. p. 82), and had hauled manure from the same shed on numerous occasions (Tr. p. 102). . . . That all the crops grown on the prison farm were used for consumption within the prison (Tr. p. 81). That the manure hauled by claimant was used as fertilizer on the prison farm and in the flower gardens within the prison (Tr. p. 81)."

After examining the record in this case, and considering the briefs and arguments of the respective parties, we conclude that claimant has failed to establish any act of negligence on the part of respondent, which proximately caused the injuries in question.

The mere fact that claimant was working on the Honor Farm outside the walls of the penitentiary does not justify an award.

It is fundamental that the State is not an insurer of an inmate's safety. Claimant must bear the burden of proving that his injury was proximately caused by a negligent act or omission on the part of respondent. This he has failed to do.

Claimant was as familiar with the conditions existing prior to and at the time of his injury as was respondent, if not more so. The proximate cause of his injury was the fact that the mules backed up rather than pro-

ceeded ahead. At this time they were under his sole control.

There is no evidence in the record, which establishes these mules to be different than any other mules. Respondent cannot be held to guarantee that a team of mules will respond to the wishes of the driver as would a motor driven vehicle.

Claimant was no novice at handling mules, and respondent was under no duty to either instruct or warn him regarding their propensity, or furnish him with an assistant to handle the mules.

Claimant contends that the cows frightened the mules, and that respondent should have either tied them up or turned them out to pasture in preparing the way for claimant to do his work.

This position is not well taken. The record reflects no evidence that respondent had knowledge of this fact. Moreover, if the presence of these cows was so significant, then certainly claimant had more of an opportunity to take remedial action himself than did respondent. He could have driven the cows out of the cow shed and into the pasture himself, or notified an agent of respondent.

Claimant also contends that the cow shed was not of sufficient height for the proper handling of the team and wagon when in the shed. There is no doubt but what the roof was too low for claimant to seat himself in the driver's position in the wagon, if the mules backed into the shed. This fact must have been as obvious to claimant as to respondent. No one ordered him to sit on the seat while driving the mules out of the shed, nor was it necessary for him to board the wagon until it was clear of the shed.

Respondent was under no duty to provide him with a certain height cow shed to clean out. This shed simply

presented an ordinary condition, which was to be reckoned with and considered by claimant in performing his duties. It was no more dangerous than any other space occupying object, and required no more skill or judgment with respect to solving any problems it created than any other object confronting man, as he daily moves throughout the world.

To hold that respondent was negligent in directing claimant to clean out this low roofed cow shed, in that it should have foreseen the resulting injury, would, in our judgment, place upon respondent the duty to insure the safety of all inmates under its jurisdiction, not only with respect to the actions and conditions of respondent's agents and chattels, but also with respect to the actions and judgments of the inmates themselves. Such, of course, is not the law.

The injury was most severe and unfortunate, but in view of the evidence we must deny this claim.

(No. 4738—Claim denied.)

MURPHY REYNOLDS, Claimant, **vs. STATE OF ILLINOIS**, Respondent.

Opinion filed October 2, 1959.

LANSDEN AND LANSDEN, Attorneys for Claimant.

GRENVILLE BEARDSLEY, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—personal injuries—malpractice. Where claimant had ample opportunity during sixty day period to tell medical staff of his condition, he cannot complain that treatment was delayed.

TOLSON, C. J.

Murphy Reynolds has filed a claim in this Court seeking an award for injuries alleged to have been caused by reason of the failure of the State to provide adequate medical care.

On August 23, 1954, claimant was confined to the Iroquois County jail in Watseka, Illinois, and was sprayed with an unknown chemical in the area of his thighs and genitals, which caused severe burns.

On August 26, 1954, he was received at the Illinois State Farm at Vandalia, Illinois to serve a ninety day term for vagrancy. Upon admission there, a prisoner is screened by a registered male nurse, and, if any condition is found that requires attention, the prisoner is referred to the prison physician. The record discloses that the farm has a modern forty bed hospital, and the prison doctor answers sick calls three times a week.

Joint exhibits Nos. 1-A and 1-B cover the physical examination made upon admission, and include dates of vaccination, typhoid inoculations and chest x-ray.

The gist of the complaint is to the effect that claimant reported his condition to the guards in charge, who he contends refused to let him answer sick call, and threatened to confine him to solitary, if he persisted in his complaints. He states that he did not see the doctor in charge until October 27th, a delay of about sixty days, and that the doctor then treated him for infection in his right leg.

Assuming for the moment that the charge is true, an examination of his hospital records discloses that he had several opportunities out of the presence of the guards to tell the nurse or attendants of his condition. On August 27th he was vaccinated, and given his first typhoid inoculation. On August 28th he was given a chest x-ray. On August 30th he was given his second typhoid inoculation, and on September 1st he was given his third typhoid inoculation.

On August 27th, when he was undressed and examined by the male nurse, the nurse questioned him

about the burns on his legs. On direct examination (page 18) the question was asked:

“Q. Did you tell him when you got those bums?

A. Not at that particular time, I didn’t.”

and, on cross-examination (page 28) :

“Q. Were your legs hurting you when you got to Vandalia?

A. Yes.

Q. Did you say anything about them hurting?

A. No.

Q. What did your legs look like?

A. They had little blisters on them.

Q. Would you say a lot of blisters?

A. Yes, sir, all over.”

At this time claimant had every opportunity to tell the nurse of his condition so that treatment could have been made, but for unexplained reasons he saw fit to say nothing.

On the basis of this record and with the opportunities present to tell of his condition, claimant was grossly negligent in not coming forward for early treatment, and the fact that he was not treated until October 27th is no one’s fault but his own.

Counsel for claimant cites the case of *Witte vs. State of Illinois*, 21 C.C.R. 173, as authority for an award. In this case, a prisoner was injured, and *immediately* taken to the hospital. The doctor in charge made a faulty diagnosis, and failed to furnish proper medical treatment.

In the instant case, claimant did not seek aid for sixty days, and, though he was in the presence of nurses or attendants on four occasions, at no time did he complain to them of his condition.

The Court, therefore, finds that claimant was negligent, and is not entitled to an award.

An award is, therefore, denied.

(No. 4696—Claimants awarded \$7,500.00.)

DONALD LINDSEY, CHRISTINE LINDSEY, PATRICIA LINDSEY, **By** CHRISTINE LINDSEY, HER MOTHER, NATURAL GUARDIAN AND NEXT FRIEND, AND BARBARA LINDSEY, **By** CHRISTINE LINDSEY, HER MOTHER, NATURAL GUARDIAN AND NEXT FRIEND, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1959.

Judge Wham dissenting.

JACOBSON AND JACOBSON AND WILLIAM SULKIN, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; RICHARD F. SIMAN AND LESTER SLOTT, Assistant Attorneys General, for Respondent.

HIGHWAYS—cinder truck stopped on highway. Evidence showed driver of cinder truck was negligent in stopping truck on highway without placing flags, flashers or flares to warn motorists.

TOLSON, C. J.

On March 25, 1955 at 1:00 P.M., claimant, Donald Lindsey, was traveling in a southeasterly direction on Route No. 126 at a point approximately two miles east of Yorkville, Illinois. The weather was misty, but there was no snow on the highway. Route No. 126 is a two lane highway, twenty feet wide, with shoulders eight feet wide. Claimant approached a curve to the right, the end of which is a small hill or elevation. From this point, a driver cannot see the condition of the road ahead until he completes the curve at the top of the crest.

On the date and time in question a State highway truck, which had been spreading cinders, stopped on the highway, as a chain attached to the spreader had fallen off. The exact place where the truck stopped is the crux of this case, and the evidence in this regard is irreconcilable.

Walter Curtin, a witness to the accident, was driv-

ing his vehicle in the opposite direction, and testified that he was within 150 feet of the scene when the collision occurred.

Claimant Lindsey testified that when he first saw the State truck, it was parked about fifty feet from the crest of the hill. When he realized that the truck was stopped, he attempted to pass on the left, but was confronted by the Curtin car coming in the opposite direction. He then pulled back into his lane, and, before he could stop, smashed into the cinder spreader of the State truck.

Mr. Lindsey suffered severe injuries to his right and left leg, and incurred medical expenses in the amount of \$5,812.18. He was out of work for five months. The State made no objections to the exhibits with reference to medical expenses, nor did the State controvert the seriousness of the injuries. There seems to be no dispute over the fact that the driver of the State truck stopped on the pavement for five or more minutes while his helper went to the rear to replace the chain on the spreader. There was room on the shoulder of the road to drive the truck entirely off of the traveled portion of the highway. Two witnesses stated there were no flashing lights, flares or flags in place to warn the traveling public. The two State employees stated the flasher was in operation. It is of interest to note the following testimony of Joe Purkye :

“We got strict instructions from our bosses that, if we had to stop a truck on the road, we had to pull on the side. If we cannot pull on the side, we have instructions to pull two wheels on the side, take a flag, go back a ways, and give a signal. We got orders a couple of times in case we stop on a highway to post red warning flags on the highway 200 feet in front of the truck and 200 feet in back of the truck. We have those flags in the truck.”

From such evidence, the Court concludes that respondent was guilty of negligence in stopping on the

pavement, and thereafter failing to warn the traveling public of the dangerous condition.

Whether claimant was guilty of contributory negligence, so as to bar a recovery, is a more difficult question, as the evidence as to the location of the truck is in hopeless conflict.

If the truck was parked fifty feet from the crest of the hill, so that claimant would have been unaware of it until he made the turn at the top, there can be no question but what he is entitled to an award.

If the truck was parked 1,800 feet from the crest, claimant would have had ample time to recognize the obstacle in his path, and a failure to drive in a manner so that he could have stopped his car in time would make him guilty of contributory negligence.

In an examination of the abstract of evidence, we note from the testimony of Frank Marklein, the driver of the truck, that he identified the location of the scene of the accident from a photograph introduced in evidence as being 1,800 feet from the crest of the hill. On re-cross examination, he stated at page 42 of the abstract that he did not measure the distance as 1,800 feet, but someone did, and then stated "I thought, it was 500 feet".

Joe Purkye, the helper on the truck, also located the position of the truck as being 1,800 feet from the crest of the hill, but at page 43 of the abstract, on direct examination, stated that the chain came off about seventeen or eighteen feet below the hill, and he told the boss, to stop, so that he could pick up the chain. In so stopping, the truck was a little bit sideways, two wheels were on the snow, and two wheels on the pavement.

Claimant's testimony was unequivocal that the truck was parked fifty feet from the crest of the hill.

The only disinterested witness in this case was Walter Curtin, a plumbing and heating contractor from LaSalle, Illinois, who saw the entire incident. He stated that he was driving in a northwesterly direction in the opposite lane of travel. The weather was misty. He was driving at about thirty miles an hour, and had his windshield wipers in operation.

He testified that the State truck had stopped with all four wheels on the pavement about fifty feet from the crest of the hill; that the blue light on the roof of the truck was not lit; that the flashers were not going, and that there were no flags or flares posted on the side of the road.

He stated that he saw a car, later identified as the Lindsey car, come around the curve traveling at about twenty-five miles per hour, that it attempted to pass the truck, but, when the driver saw the Curtin car, he pulled back into the right lane and hit the spreader.

At this point, we have the testimony of claimant, an interested witness, locating the truck fifty feet from the hill; the testimony of Mr. Curtin, a disinterested witness, locating the truck fifty feet from the hill; the testimony of Mr. Marklein, an interested witness, locating the truck 1,800 feet from the hill, who also stated he thought it was 500 feet; the testimony of Mr. Purkye, an interested witness, locating the truck 1,800 feet from the hill, who also stated that the chain fell ~~off~~ seventeen or eighteen feet from the hill, and who yelled at his boss to stop. One may inquire at this point whether the driver would have continued 1,800 feet before stopping to pick up the chain.

The further testimony of Mr. Curtin is helpful in resolving this conflict for at page 6 of the abstract he stated that he went over to the State truck and asked

the driver if he would move his truck up near the curve and *turn on his flasher*. He further stated that they moved the truck a little ways, and he then asked them to move it further, which they did.

It is understandable, when an accident occurs, that a certain amount of confusion exists, and that locating the position of the truck at a later date may be difficult. Since the truck was moved twice after the accident, it is apparent that the State employees could have been honestly mistaken in their testimony.

From an analysis of this testimony, we, therefore, conclude that the truck stopped about fifty feet from the hill, and that claimant, in the operation of his vehicle, was not guilty of contributory negligence.

Claimant further argues that he was placed in a position of danger without notice or warning of the condition, so that he should not be charged with contributory negligence for any error of judgment in choosing one of several alternate courses, which he believed would have avoided the collision.

Our courts have repeatedly held that a plaintiff is not to be charged with negligence if he, without fault, is confronted with a sudden emergency due to the negligence of another, and is obliged to instantly adopt a course of action in an effort to avoid injury.

Wolfe Mfg. Co. vs. Wilson, 46 Ill. App. 381.

Junction Mining Co. vs. Ench, 111 Ill. App. 346.

Reviewing some of the cases appearing in the Court of Claims Reports, we find that these cases turn on a question of fact. If contributory negligence was found, a claim was denied.

Porter vs. State of Illinois, 21 C.C.R. 116.

Johnson vs. State of Illinois, 21 C.C.R. 528.

Perry vs. State of Illinois, 21 C.C.R. 311.

To the contrary, if the State was negligent, and claimant was found to be free from contributory negligence, an award was made.

Howard vs. State of Illinois, 21 C.C.R. 116.

The Court believes that the facts of this case are similar to the Howard case (*supra*), and that claimant has established his case by a preponderance of the evidence.

An award is, therefore, made to claimant, Donald Lindsey, in the amount of \$7,500.00.'

(No. 4750—Claim Denied.)

CHARLES CALLEN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1959.

STANFORD S. MEYER, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*pedestrian falling on shoulder*. State is not liable for injuries sustained in fall on shoulder of highway, which was not a crosswalk, but rather was used as a parking area for a tavern.

SAME—*duty of State to maintain shoulder of highway for pedestrian traffic*. State is under no duty to maintain the shoulder of the highway in the same condition as the traveled portion thereof, nor to maintain it for pedestrian travel. The State is further not bound to maintain the shoulder of the highway to the extent that it must maintain crosswalks at intersections for pedestrian travel.

NEGLIGENCE—*contributory negligence*. Claimant failed to prove freedom from contributory negligence.

FEARER, J.

Claimant, Charles Callen, brings this action to recover \$7,500.00 for personal injuries, which he sustained on December 4, 1954, when he fell on the shoulder of a public highway, known as Old Illinois State Route No. 40, outside of the city limits of Highland, Madison

County, Illinois, a short distance south of the Green Lantern Tavern.

As the result of the fall, claimant sustained injuries consisting of a spiral fracture of the lower third of the tibia, and also a fracture of the lateral malleolus, the end of the fibula.

At the time of the injury claimant was employed by the State of Illinois receiving **\$1.40** per hour, and working a forty hour week. He was out of work for seven months with an alleged total loss of earnings of \$1,568.00. Medical bills, incurred as the result of said injuries, were as follows : Hospital expenses **\$327.85**, and doctor's fees \$250.00.

A summary of the evidence is as follows:

On the evening of December **3, 1954**, Mr. Callen, accompanied by his wife and friends, Gus Liening and his wife, visited the V.F.W. Post in Caseyville, Illinois. From there they went to the Sky Line Tavern. In both of these taverns they consumed beer, and at the Sky Line Tavern they also ate. Before midnight they went to the Green Lantern Tavern, which was across the highway from the Sky Line Tavern, and, while at the Green Lantern Tavern, they consumed more beer. They left the Green Lantern Tavern shortly after midnight on December **4, 1954**.

On arriving at the Green Lantern Tavern, Mr. Liening parked his automobile a short distance south of the tavern, which was located on the west side of State Route No. 40. The automobile was parked some four or five feet west of the paved portion of the highway on the shoulder, which was on the west side of the road, and was approximately six feet in width.

Many patrons of the tavern had parked their automobiles, which was the custom, on the shoulder in front of the tavern. The front door of the tavern was approxi-

mately forty feet from the west edge of the paved portion of the highway.

There is a conflict in the evidence as to the shoulder on the west side of the highway being in a poor state of repair. The shoulder was described as being constructed of gravel, macadam and cinders. This was a patrolled highway. From the evidence it appears that the depression or hole was only noticeable after a rainfall, and only then because water remained in it. The hole in which claimant fell was described as being two and one-half to three feet in diameter and from two to two and one-half inches deep.

Claimant is contending that the shoulder in front of the tavern had slight depressions in it, which were hazardous, and had been for a considerable period of time, and that the State had actual, or at least constructive notice of this. The evidence in this regard is not too convincing. However, this is not the determining factor in deciding this case. There is a slight conflict in the evidence as to the exact location of the hole or depression in which claimant slipped and fell, and thereby sustained personal injuries. It is convincing, however, that, prior to December 4, 1954, no one ever complained about the condition of the highway or shoulders adjacent thereto.

Upon leaving the tavern, claimant and his wife and friends were walking in a single file between cars parked on the shoulder to Mr. Liening's automobile. Claimant was walking directly in front of his wife. Claimant's wife testified that she did not see the hole, but saw her husband slide into the hole, which caused him to fall.

Claimant contends that the shoulder on the highway was in a poor state of repair; that respondent had actual or constructive notice; and that it owed a duty to

pedestrians walking on said shoulder, or right of way, to maintain its right of way for the protection of pedestrians.

This is not a case where claimant is contending that the shoulder was not maintained in a reasonably safe condition for traffic traveling upon State Highway No. 40. There is no question but what the highway was under the jurisdiction of the State of Illinois, and that the accident occurred on the right of way.

There is, however, a serious question as to the liability of respondent to maintain its shoulders in such a condition that it would be safe for pedestrians and people using the State right of way in parking their automobiles in front of the tavern.

The State is not an insurer of all persons injured on its rights of way.

Arvidson vs. City of Elmhurst, 8 Ill. App. (2d) 183, 189.

Grant vs. State of Illinois, 21 C.C.R. 563.

The State is not obligated or required to maintain the shoulders of its highways in the same condition as it is required to maintain the traveled or paved portion of its highways. This is particularly true in the absence of crosswalks or sidewalks outside of corporate limits.

The facts in this case do not constitute a duty upon the State to maintain the shoulders as parking areas for taverns, nor to maintain shoulders for pedestrian travel, even though the State and municipalities must maintain crosswalks at intersections in a reasonably safe condition for pedestrian travel. However, it does not follow that either the State or municipality must maintain all public highways under its jurisdiction in the same manner and condition as sidewalks and crosswalks should be maintained. To so require would place an impossible burden upon the State.

Claimant did not fall on a sidewalk or crosswalk. The point where the car was parked, which he was approaching at the time, was south of the tavern along the State right of way. To require the State to maintain its shoulders as a parking area for pedestrians of the tavern would be placing an undue burden upon the State. This tavern is located in a rural area, and, even though claimant and other patrons of the tavern had a right to walk upon the shoulder or State right of way going to and from the tavern, this would not require or place a duty upon the State to so repair or maintain the shoulder for pedestrians.

The majority of the citations set out in the brief referred to the responsibility of municipalities and respondent in maintaining crosswalks and sidewalks, and the balance of authorities referred to the duty of the State to maintain the paved portion of its highways and the shoulders located along said highway in a reasonably safe condition, but not requiring the State to maintain its shoulders in the same condition as the paved portion for the protection of vehicular traffic.

This Court recently had an occasion to pass on the case of *Mary Barrett vs. State of Illinois*. The accident in that case happened in Utica, Illinois, while claimant traveled across the State highway at a point where there was no crosswalk or sidewalk. In that case we denied recovery. There was cited in the opinion the case of *Boender vs. City of Harvey*, 251 Ill. 228, in which case the court said on pages 230 and 231:

“* * * Municipal corporations are not insurers against accidents. The object to be secured is reasonable safety for travel considering the amount and kind of travel, which may fairly be expected upon the particular road or street. A highway in the country need not be of the same character as a street in a large city. (*Molway vs. City of Chicago*, 239 Ill. 486.) * * * only duty cast upon the city is that it shall maintain

the respective portions of the street in a reasonably safe condition for the purposes to which such portions of the street are devoted.”

Claimant has not cited a case that places a duty upon respondent to maintain the shoulders of its highways in such a condition that they would be safe for the protection of pedestrians walking thereon.

It is further significant that of all the parking and travel by patrons in going from their automobiles to and from the tavern, the fact that claimant, and those accompanying him, had gone into the tavern and returned to their car, it was only claimant who fell in the depression. Further, since no one had ever complained before to any of respondent's agents that this shoulder was in such a bad condition that it required attention, it is very apparent to us that claimant has failed to establish that he was in the exercise of ordinary care for his own safety at the time of the injury.

If the hole in the shoulder was as large and as dangerous as claimant is now trying to present and make this Court believe, it is hard to understand why he should not have seen the hole and stepped over it as other witnesses testified they did.

We are denying this claim for the reason that to place the burden upon respondent, which claimant is now contending in this particular area, would be placing a burden upon it, which the law does not contemplate, particularly for pedestrians outside of a municipality. State roads outside of municipalities do not have to be maintained in the same manner as sidewalks and crosswalks within municipalities for pedestrians.

Questions of contributory negligence and proximate cause, being questions of fact, and this Court not only being a trier of the law but a trier of all the facts, from the state of the record we cannot see where claimant has

maintained the burden of proof, which he is required to maintain in order to obtain a recovery.

For the reasons above stated the claim is hereby denied.

(No. 4832—Claimant awarded \$7,049.40.)

FEDERAL BARGE LINES, INC., Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed *November* 10, 1959.

JOHN F. GILLESPIE AND BELNAP, McAULIFFE AND
SPENCER, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; LESTER SLOTT,
Assistant Attorney General, for Respondent.

WATERWAYS—negligence—Both-to-Blame Rule. Where evidence showed that both bridge tender and boat operator were at fault, loss was divided in accordance with Both-to-Blame Rule of Federal maritime law.

TOLSON, C. J.

Claimant, Federal Barge Lines, Inc., seeks an award for damages to the M/V Huck Finn in the amount of \$14,098.81 by reason of a collision with the Brandon Road Bridge, which was alleged to have been negligently lowered by an employee of respondent.

Respondent did not offer any evidence in the case other than a Departmental Report, and predicates its defense on the failure of the M/V Huck Finn to sound a long blast of the whistle, which is the signal to open the bridge, and is required by Rule No. 7 of the Federal Rules and Regulations governing the operation of draw bridges crossing the Mississippi River and its navigable tributaries.

There is no dispute as to the facts, which may be summarized as follows :

At about 2:20 A.M. on the morning of July 19, 1956,

a collision occurred between a towboat, the M/V Huck Finn, which was owned and operated by claimant, and the Brandon Road bridge, a highway bridge, owned and operated by respondent, which spans the Des Plaines River, a navigable waterway of the United States.

The locale of the collision is shown on claimant's exhibit No. 1, which is a copy, original size, of chart No. 62 of the navigation charts of the Illinois Waterway from the Mississippi River at Grafton, Illinois, to Lake Michigan at Chicago and Calumet Harbors, prepared by the Corps of Engineers, U.S. Army. As indicated by the exhibit, the bridge crosses the waterway about 150 feet below the lower gates of Brandon Road lock. However, it is closer to the lock gates at its north end than at its south end, since it crosses the waterway at an angle. The bridge is a double-leaf bascule bridge, having a horizontal clearance of 110 feet, and a vertical clearance closed of 15.4 feet above pool stage.

At the time of the collision the M/V Huck Finn was proceeding downstream, and was running light, that is, without barges. She had just passed through the Brandon Road lock, having locked through with the M/V Hugh C. Blaske and its tow of five barges, which she was following out of the lock, when the bridge, without any warning or signal, was lowered in front of her. She was unable to kill her headway, and she collided with the bridge.

Prior to the time of the accident, when the pilot came on match it was raining, but the rain stopped about 1:00 A.M., and it was hazy at the time of the collision. All necessary navigation lights were burning, the red and green lights on the pilot house, two white lights above the pilot house, and one stern mast light to indicate that the M/V Huck Finn was running without barges. In addi-

tion, amber guard lights running entirely around the main deck were turned on. The 10,000 candle-power searchlight was on when the M/V Huck Finn entered the lock. It was turned off in the lock. Then it was turned on again as the M/V Huck Finn left the lock, and remained on until the time of the collision.

The M/V Blaske was southbound with a tow of five barges, and the M/V Huck Finn requested permission, which was granted, to lock down with the M/V Blaske. The M/V Blaske and its tow entered the lock first. It moored on the left descending wall. Its tow was made up of three barges wide across the head, and two wide back next to the boat. All of the barges were ahead of the towboat. The extra barge on the head end was on the starboard side. Upon entering the lock the M/V Huck Finn tied off on the face barge of the M/V Blaske tow, that is, the barge directly in front of the towboat. The head line from the M/V Huck Finn ran to the face barge on the M/V Blaske tow, and the stern line from the M/V Huck Finn ran to the M/V Blaske.

After the M/V Huck Finn entered the lock and moored alongside the M/V Blaske, her engines were stopped until the lock chamber was emptied. As soon as the lock chamber was emptied, and the lower gates were opened, the lock man signaled permission to leave the lock by blowing a short whistle. This is the signal prescribed by Army regulations for permission to leave the lock (33 C.F.R. 207.300 (e) (1)(iii) (a)).

The lock man then blew a long blast on the whistle for the bridge to open. There is no rule prescribing such a signal to be given by a lock. The prescribed signal to be given by an approaching vessel for a bridge to open is one long blast of the whistle (33 C.F.R. 303.555(d)(1) (i)). However, the testimony of the pilot of the M/V

Huck Finn was that "they (the lock personnel) always blow whistles to open the bridge."

After the lower gates were open, the M/V Blaske blew a short whistle as a signal to turn the lines loose from the lock wall. She then blew a long whistle for the bridge to open, and the bridge answered with a siren. The bridge was still down when the lower lock gates were opened. With the bridge down and the lower gates opened the pilot of the M/V Huck Finn could see the bridge control house.

As soon as the M/V Blaske started moving, the M/V Huck Finn immediately blew a short whistle to signal the mate to turn loose from the M/V Blaske. *The M/V Huck Finn, independently, did not blow a long whistle for the bridge to open.* Just after the M/V Huck Finn had cleared the lower lock gates, the pilot noticed that the bridge was coming down. He estimated that, to the best of his judgment he was about a hundred feet away from the bridge when he first noticed that it was coming down. There is a red light on the end of each leaf of the bridge. At no time did the color of these lights change, and no signal was ever given by the bridge, either visual or sound, that the bridge was coming down.

As soon as the pilot noticed that the bridge was descending, he immediately blew the danger signal consisting of four short blasts of the whistle. He stopped the engines and reversed them. He estimated his speed at about one mile an hour. There was practically no current at the time. He estimated that it took about 15 to 20 seconds to reverse the engines. He kept backing the engines, but had to leave the pilot house, and, as he went around the corner of the pilot house, he was cut by a piece of glass. He was unable to kill the headway on the boat, however, and the right descending leaf of the

bridge (that is, the right leaf of the bridge looking at the bridge headed downstream) struck the starboard corner of the pilot house. The M/V Huck Finn stopped directly under the bridge. The airline controls in the pilot house were broken by the collision, and the engines were still backing, so the pilot had to go to the engine room to get the engineers to stop the engines.

During all this time, after the M/V Huck Finn started leaving the lock, its 10,000 candle-power searchlight was shining down the right descending wall of the lock directly under the bridge.

The damages, which the M/V Huck Finn incurred as a result of the collision, were repaired by the St. Louis Shipbuilding & Steel Co., the parent corporation of claimant. The St. Louis Shipbuilding & Steel Co., which is the largest shipyard on the inland waterway system in volume of business, and which repairs and constructs vessels for other companies as well as for Federal, performed the repair work in this instance under a contract with Federal, based on its published rate schedule, which is, in turn, based on time and material charges.

When the collision first occurred, the St. Louis Shipbuilding & Steel Co. was notified to send a man up to the scene of the accident to make a survey so that the necessary materials for the repairs could be gotten together. The St. Louis Shipbuilding & Steel Co. did not have all the necessary equipment to make final repairs, so temporary repairs were made to the M/V Huck Finn on July 21 through July 24, on which date the M/V Huck Finn went back into service. On August 22, 1956, the M/V Huck Finn again arrived back at the shipyard for permanent repairs, which were completed on September 8, 1956, at which time the M/V Huck Finn departed. The permanent repairs consisted of putting the pilot house

back in its original condition. This included installing necessary navigating equipment, whistle, light, air horn, two searchlights, radar, radio, engine controls, replacing damaged handrailing and flying bridge on each side of the pilot house, and completely rewiring it.

Invoices for the work performed were rendered claimant by the St. Louis Shipbuilding & Steel Co., and were paid. In addition, invoices were rendered to claimant by R.C.A. Communications, Inc., R.C.A. Service Company, Inc., and Southwestern Bell Telephone Company for material and services furnished by those companies, which invoices were paid.

The items of repair and the cost thereof are as follows (claimant's exhibits Nos. 6, 7 and 8):

1. Repair pilot house	\$10,935.77
2. Repair radio equipment	17.98
3. Renew handrailing on starboard side of upper deck house and around pilot house bridge	770.53
4. Re-install covers over steering gear. .	65.21
5. Replace and install public address system	201.26
6. Temporary repairs	975.79
7. Repair radar equipment	239.18
8. Repair mobile telephone	76.50
9. Install temporary controls on search- lights, port and starboard	648.07
10. Additional radar parts required for installation	168.52
	<hr/>
	\$14,098.81

This Court has had several cases, similar to the one at bar, the most recent of which is reported in 22 C.C.R.

659 (*J. E. Vickers, Et Al vs. State of Illinois*). In this case, the Court adopted the rule in *Clement vs. Metropolitan West Side El Ry. Co.*, 123 Fed. 271:

"A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing."

The Vickers' case cites the principle of law governing the use of navigable streams by owners and operators of vessels and bridges, and this Court has determined that it is bound by the Federal regulations and decisions under the Federal maritime law.

With this background, our first inquiry is directed to the charge that the proximate cause of the collision was the fault on the part of the bridge tender in failing to exercise reasonable care to see that the draw was clear before closing the bridge. The facts would seem to support this charge, for the evidence discloses that the area to be viewed by the bridge tender is but 150 feet from the bridge to the lower end of the lock. The M/V Huck Finn was ablaze with light, and, in addition thereto, a 10,000 candlepower searchlight was shining on the right wall. The only conclusion that can be reached is that the bridge tender was negligent in not viewing the area before he commenced to lower the bridge.

As stated by the court in *The Royal*, 233 F. 296. 298 (E.D.N.Y., 1916):

"The duty also devolves upon the bridge tender, as in the case of any other draw bridge, not to close the draw in the face of a boat, which has:

by signal or by actual approach to the open draw, reached a position where it cannot safely remain or maneuver, if the draw be closed.”

Respondent argues that claimant is not entitled to an award, as it did not comply with Paragraph No. 7 of the Federal Rules and Regulations governing the operation of draw bridges crossing the Mississippi River and its navigable tributaries. The rule is set forth as follows :

“(7) When vessels are approaching a bridge or a draw from the same direction, each vessel shall signal independently for the opening of the draw, and shall be navigated in accordance with the pilot rule applicable to the waterway governing such vessels.”

The facts disclose that the lock tender blew a long whistle, which was for the purpose of directing the bridge tender to open the bridge. Claimant testified that such was a common practice at this particular bridge. In addition thereto, the M/V Blaske blew a long whistle. However, the fact remains that the M/V Huck Finn did not blow a long whistle, and was, therefore, at fault for not complying with Rule No. 7 mentioned above.

Thus the case reaches an impasse. Claimant argues that, if the bridge tender had looked, he could not have failed to see the M/V Huck Finn, as it was elaborately lighted. Respondent argues that, if the M/V Huck Finn had blown a long whistle, the bridge tender would have been fully aware of the fact that two vessels were in the area, both seeking to pass under the bridge.

The Court believes and so finds that the failure to blow the long whistle, as required by regulation, was a material omission of duty on the part of claimant, and one that would be construed as contributory negligence so as to bar a recovery.

Claimant, recognizing this defense, has finally urged that, if the Court finds contributory negligence on the

part of the M/V Huck Finn, it should follow the admiralty principles of maritime tort known as Both-to-Blame Rule. Under Federal maritime law, where two vessels come into collision and both are guilty of fault, the damages are divided equally between them, even though there is a disparity of fault between the vessels. *Gilmore and Black, The Law of Admiralty* (1957), page 402; *Intagliata vs. Shipowners and Merchants Towboat Co.*, 159 P. (2d) 1, 5 (Calif., 1945). This rule also applies to a collision between a bridge and a vessel. *Steel All Welded Boat Co. vs. City of Boston*, 18 F. Supp. 421, 423 (Mass., 1937). This principle is also set forth in Vol. 45 of *Corpus Juris* in the chapter on Navigable Waters. Sec. 80—Contributory negligence, “where both the bridge owner and those in charge of the vessel are negligent, the practice in the Federal Court is to divide the damages”. *Great Lakes Towing Co. vs. Masaba S.S. Co.*, 237 Fed. 577; *Smith vs. Shakopee*, 103 Fed. 240.

Respondent has not introduced any evidence as to damages to the bridge, and it would appear from the briefs that the only damage was to the paint on the bridge. The record discloses that claimant suffered damages in the amount of \$14,098.81. Applying this rule to the case, claimant would, therefore, be entitled to \$7,049.40.

From the evidence in this case, the Court finds that both claimant and respondent were guilty of negligence, and, upon the application of the Both-to-Blame Rule under maritime law, claimant is entitled to an award of \$7,049.40.

We, therefore, allow the claim of Federal Barge Lines, Inc., in the amount of \$7,049.40.

(No. 3025—Claimant awarded \$2,608.21.)

ELVA JENNINGS PENWELL, Claimant, vs. STATE OF ILLINOIS.
Respondent.

Opinion filed January 12, 1960.

JOHN W. PREIHS, Attorney for Claimant.

GRENVILLE BEARDSLEY, Attorney General; WILLIAM
H. SOUTH, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*supplemental* award. Under the authority of *Penwell* vs. State of *Illinois*, 11 C.C.R. 365, claimant awarded expenses incurred for nursing care, drugs, etc., for the period of April 1, 1959 to November 1, 1959.

TOLSON, C. J.

On December 7, 1959, claimant, Elva Jennings Penwell, filed a supplemental petition for reimbursement for monies expended by her for medical services and expenses from April 1, 1959 to November 1, 1959.

On December 8, 1959, claimant and respondent filed a joint motion for leave to waive the filing of briefs and arguments, and alleged that claimant's receipts for payment of medical bills and services constituted the entire evidence in the case.

Claimant was injured in an accident, while employed at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The accident occurred on February 2, 1936, and the original award is reported in 11 C.C.R. 365. This Court retained jurisdiction of the case, and successive awards have been made from time to time.

The petition before the Court at this time again discloses that claimant is permanently disabled, and is entitled to an additional award.

Original receipts, received in evidence, establish the following claim :

Item A:	Nursing	\$ 863.50
	Room and board for nurses	372.75
Item B:	Drugs and supplies	174.80

Item C: Physician	870.00
Item D: Transportation	80.00
Item E: Miscellaneous	247.16
Total Expenses	<u>\$2,608.21</u>

An award, is, therefore, made to claimant for monies expended from April 1, 1959 to November 1, 1959 in the amount of \$2,608.21.

The Court reserves jurisdiction for further determination of claimant's need for additional medical care.

(No. 4802—Claimant awarded \$559.50.)

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1960.

DIXON, DEVINE AND RAY, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; SAMUEL J. DOY, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*damages caused by escaped inmate.* Evidence showed that State was negligent in not maintaining closer surveillance of inmate, who had a long history of escapes.

SAME—burden of proof. Where claimant established prima facie case and defendant offered no evidence on escape of inmate, an award will be made.

CONTRIBUTORY NEGLIGENCE—*leaving keys in automobile.* Sec. 189 of Chap. 95½, Ill. Rev. Stats., applies only to vehicles left unattended on public highways, and does not apply to vehicles parked on private drives.

SAME—leaving car unlocked. Claimant was not guilty of contributory negligence merely because he left car unlocked.

WHAM, J.

Claimant, United States Fidelity and Guaranty Company, A Corporation, is the subrogee of its insured, John Kavanaugh, Dicoii Illinois, by virtue of its net payment in the amount of \$559.50 under a collision insurance policy covering a 1952 Buick four-door sedan, which was damaged beyond repair on September 17, 1957, while

being driven by one Wesley Washington, an escaped inmate from the Dixon State School, who had stolen the automobile parked in the driveway of the Kavanaugh home.

The claim is predicated upon Chap. 23, Sec. 4041 (formerly Sec. 372a), Ill. Rev. Stats., as interpreted by the Court in *Dixon Fruit Company, A Corporation, Et Al* vs. *State of Illinois*, 22 C.C.R. 271.

The amount of the claim is undisputed, and the parties agree that claimant is the sole owner of the claim by virtue of the subrogation receipt, which assigned the interest of John Kavanaugh to claimant.

It is undisputed that the damage was caused by one Wesley Washington, an escaped inmate from the Dixon State School.

Respondent contends, however, that the State was not negligent in exercising its custody over the inmate, and, therefore, not liable for damages. With respect to this contention, the facts surrounding the prior record of, custody of, and escape of Wesley Washington are as follows:

On September 17, 1957, one Wesley Washington and two other inmates escaped from the Dixon State School, a charitable institution located at Dixon, Illinois, over which the State of Illinois had and still has control. Some time between the hours of 11:00 P.M. on September 17, 1957 and 2:30 A.M. on September 18, 1957, the escapees stole the Kavanaugh vehicle, and, while driving on River Street in the City of Dixon, Washington lost control of the vehicle, and ran into a row of parking meters.

The Dixoi State School is a State institution operated by the Department of Public Welfare for the care and rehabilitation of mentally retarded individuals. It is not a penal institution. The patients are not restrained,

but are free to come and go on the grounds unless their behavior is such as to be a constant threat to their physical or mental well-being. Aggressive or assaultive patients are kept in cottage A-3, and subjected to security measures.

Wesley Washington was admitted to the Dixon State School on March 10, 1955, from Kane County, as mentally deficient. Prior to his admittance, he was reported to have failed to adjust in school, to have been a constant truant, and to have been mischievous. He had been originally placed in the school at St. Charles, where it was determined that he had an apparent disregard for authority. He was then transferred to the Dixon State School.

The record of Wesley Washington, while at Dixon from the date of his admittance up to and including the theft in question, discloses the following acts attributed to him:

March 10, 1955—Admitted to Dixon State School as mentally deficient.

March 20, 1955—Assaulted an employee.

April 9, 1955—Escape and apprehension, burglary of several cars and stealing clothes.

June 10, 1955—Broke windows in school building.

Sept. 18, 1955—Impudent behavior toward employee.

Nov. 21, 1955—Unauthorized absence, returned December 2, 1955.

Feb. 14, 1956—Unauthorized absence, dissatisfied with job.

April 9, 1956—Refused to work, incited other boys to join with him.

- June 14, 1956—Unruly, aggressive and attacked employee.
- Sept. 1, 1956—Threatened resident with a knife for refusing to commit sodomy.
- Jan. 7, 1957—Unauthorized absence.
- Sept. 17, 1957—Unauthorized absence, involved with Joseph Johnson in car stealing incident in Dixon, Illinois. Returned to custody September 24, 1957.

On September 17, 1957, Washington, who was then sixteen years of age, was not assigned to a security cottage, but was at liberty on the school grounds. At that time there were no proceedings in progress for his transfer, although he was later transferred to Lincoln State School on October 31, 1958.

All of these facts were established by claimant, who called Dr. A. T. Waskowicz, Assistant Superintendent, Medical, of the Dixon State School, as an adverse witness under Sec. 60 of the Illinois Civil Practice Act. He testified to the facts from the records in his possession, which he described as not complete.

Respondent offered no testimony as to the circumstances surrounding the escape, and contends that, although the record of this inmate was bad, continuous close restraint would defeat the rehabilitation program of the hospital.

While it is true that a certain amount of discretion should rest with the officials in charge of such an institution in pursuing a rehabilitation program, it is no defense to rely solely on the contention of rehabilitation, without establishing what respondent did in exercising a reasonable restraint of such a person.

The evidence offered by claimant is sufficient to establish a prima facie case of negligence on the part of respondent. It is apparent that this inmate should have been kept under greater surveillance than the ordinary inmate. The facts establish that he was not so kept.

Respondent offered no testimony on the point. The facts pertaining to the surveillance and escape of the inmate were in the exclusive control of respondent, and would have been presented had they been favorable to respondent.

We, therefore, conclude that claimant has borne the burden of proving that respondent was negligent in allowing the inmate to escape.

Respondent next contends that claimant's insured, John Kavanaugh, was contributorily negligent in that he violated so much of the following statute, being Chap. 95½, Sec. 189, Ill. Rev. Stats.:

"No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key."

With respect to this contention, the facts are as follows: John Kavanaugh had parked his automobile in front of his house at about 6:00 P.M., and had left his keys in the ignition. His wife then drove it on an errand about half an hour after dinner, and on returning parked it in the driveway in front of their home. She had taken the keys of her husband out of the ignition, laid them on the seat, used her own key in driving the car, and unintentionally left her husband's keys on the seat, when she returned the automobile to its parking place. She removed her own keys from the ignition and locked it.

Mr. Kavanaugh had intended to use the automobile to go to a meeting, but instead rode with a friend. Neither he nor his wife used or entered the automobile thereafter

until it was stolen some time after 11:00 P.M., when Mr. Kavanaugh last saw it. It was recovered at about 2:30 A.M. the next morning, after it had been stolen and wrecked.

We recognize that the Supreme Court of Illinois in the case of *Ney vs. Yellow Cab Company*, 2 Ill. (2d) 724, held that a violation of the statute was prima facie evidence of negligence on the part of the operator of an automobile, and that either a judge or jury, under the facts in the case, could find that such violation was negligence, which proximately caused the injury to the plaintiff.

We do not feel that this case controls the question of contributory negligence in the instant case for two reasons: First, a close reading of the statute reflects that John Kavanaugh did not violate the statute, even though he left the keys first in the ignition and next in the seat. The statute is a part of the Act entitled "Uniform Act Regulating Traffic on Highways" (Chap. 95½, Sec. 238, Ill. Rev. Stats.).

In the same Act is Sec. 117, Chap. 95½, Ill. Rev. Stats., providing as follows:

"The provisions of this Act relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways, except:

1. Where a different place is specifically referred to in a given section.
2. The provisions of Articles IV and V shall apply upon highways and elsewhere throughout the State." (Articles IV and V pertain only to Secs. 133-145 of Chap. 95½, which are not involved herein.)

It is noted from the testimony of the only witness testifying in the case on the particular point that the automobile was parked in the driveway of a private residence at the time it was stolen and not upon a public highway.

Sec. 189 does not specifically refer to any particular place, and, therefore, by the terms of the Uniform Act

Regulating Traffic on Highways, does not apply to a vehicle left unattended at any place other than on the public highway.

This is the only reasonable construction of the statute. If it applied to all places, then leaving the key in an automobile while parked in a locked garage would be as much a violation of the statute, as would parking it in a car port or private driveway at a residence. This could not have been the Legislature's intention.

We know of no rule at common law requiring the owner of an automobile to keep it locked under the circumstances involved herein, and do not intend to announce such rule ourselves.

Secondly, the Ney case is not controlling, even though we assume that the automobile was left unattended and unlocked on the public highway in front of the Kavanaugh home in violation of the statute.

The factual situations of the two cases differ. In the Ney case a taxi driver left a taxicab unattended with its motor running on the downtown streets of Chicago., where it was stolen by a thief, who in flight ran into the plaintiff's vehicle. In the instant case, the vehicle was parked in a residential area in the City of Dixon, Illinois, with its ignition locked. In the night time it was stolen by an escaped inmate, who drove it into a parking meter post on a public parking lot some distance from where it was stolen.

Granting that a jury, or judge without a jury, might find the proximate cause of damage to the plaintiff in the Ney case to be a violation of the statute, we, as judges of the facts as well as judges of the law, do not feel compelled to follow a permissible jury verdict or court finding of fact in the Ney case as a finding precedent in this case.

We conclude that the action of the inmate in entering the automobile in the night time, finding the ignition locked, finding the keys on the seat, stealing the car from the front of the residence, and driving it into a post in another part of town, was not reasonably to be foreseen by John Kavanaugh in the exercise of ordinary care for the protection of his property, and constituted the proximate cause of the damage to the Kavanaugh automobile. Consequently, even assuming a violation of the statute, we do not believe that it constitutes contributory negligence, which proximately contributed to the damage in question, so as to bar recovery by this claimant.

We believe from the evidence in this case that claimant's insured, John Kavanaugh, was in the exercise of ordinary care for the safety of his automobile, that respondent was negligent in exercising custody over the escaped inmate, and, as a proximate result thereof, the vehicle was stolen and damaged.

The claim is, therefore, allowed in the sum of \$559.50.

(No. 4808—Claim denied.)

MARIE HALLOWAY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1960.

ZWANZIG, THOMPSON AND LANUTI AND ALEXANDER T. BOWER, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; SAMUEL J. DOY, Assistant Attorney General, for Respondent.

HIGHWAYS—operation of snowplow. Evidence failed to prove State guilty of negligence in the operation of a snowplow on highway.

SAME—application of Motor Vehicle Act to State. Motor Vehicle Code does not apply to equipment of State while actually engaged in work upon the highways. Chap. 95½, Sec. 120e, Ill. Rev. Stats.

DAMAGES — burden of proof—speculation. Where two sets of witnesses are in direct conflict, the Court will not speculate on which is correct. In the instant situation, claimant failed to prove case by a preponderance of the evidence.

WHAM, J.

Claimant, Marie Halloway, received injuries to her person when the automobile driven by her husband, in which she was riding as a passenger, ran into the back end of a snowplow truck operated by the Division of Highways, State of Illinois, which was being used to spread cinders on U. S. and State Route No. 52 between Serena and Joliet, Illinois, on February 6, 1956 at 9:30 P. M.

She claims damages in the amount of \$7,500.00 by reason of the following allegations of negligence on the part of respondent, as set forth in her complaint:

1. Negligently stopped said truck on the highway.
2. In the alternative, negligently operated said truck at such a slow speed as to constitute danger.
3. Negligently failed to place warning flares along the highway to warn of the truck's presence.
4. Negligently failed to display a red light or lights, or reflectors on the rear of the truck in violation of the statute, and negligently failed to operate a flashing red light warning device on top of the cab of the truck.

The facts pertaining to the happening of this accident are as follows:

On February 6, 1956, at about 9:30 P. M., claimant was a passenger in an automobile, which was being driven by her husband. They were proceeding in an easterly direction on U. S. Route No. 52. The weather conditions that evening consisted of a freezing, misty rain, and the highway was wet and slippery in spots. Visibility was approximately 200 yards. At a point on Route No.

52, approximately 2½ miles east of Serena, Illinois, the automobile, in which claimant was riding with her husband, collided with the rear end of a truck owned by respondent. The truck at the time of the collision was traveling in an easterly direction at about six miles per hour. It was occupied by two men, who were agents of respondent. They were engaged in the spreading of cinders on the highway, and were using a cinder spreader attached to the back of the truck beneath the tailgate.

According to claimant's testimony, the lights, windshield wipers, defrosters and heater on claimant's car were all functioning properly. Claimant's automobile was traveling at approximately 25 to 30 miles per hour at the time of the collision. The truck, as heretofore set forth, was traveling at about six miles per hour. According to claimant, she and her husband, together with their small child, were not conversing at the time of the accident. The husband, however, testified that he and claimant were carrying on a conversation about claimant's mother. They both testified they did not see the truck until they were about 12 or 14 feet from it, at which time they saw a yellow blur. Both witnesses testified that the truck lights were not functioning at the time of the collision.

The truck driver and his helper testified that the truck was equipped with three amber clearance lights on the back of the cab facing to the rear; three amber clearance lights on the cab facing forward; a blue flasher light on top of the cab; a six inch red light on the left front side of the truck box facing to the rear; and two kerosene torches hanging on the cinder spreader. According to the driver, the lights had been checked before the truck was taken out, and again a few minutes before the collision, when they had stopped to check their load of cinders. They were all in operation.

At the time of the collision, the truck bed was elevated about one foot from its normal position. Respondent's witness testified that the elevation of the truck bed at that level did not obscure the clearance lights, the blue flasher, or the six inch red light. Respondent's agents testified that the cinders were spread directly downward, and did not create dust, because they had been treated with chloride.

From a consideration of these facts, we must deny this claim for the reason that claimant has not borne the burden of proving that respondent was negligent in the manner charged in her complaint.

First, the evidence clearly established that the truck was not stopped upon the highway.

Second, her contention that the State truck, while traveling only six miles per hour, violated Sec. 148(a) of the Uniform Traffic Act is not well taken. It reads as follows:

"No person shall drive a motor vehicle at such slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation of his vehicle or in compliance with law."

The statute relied upon is inapplicable by reason of the terms of the same statute at Sec. 120(e), Ill. Rev. Stats., Chap. 95½, wherein it provides that the Act shall not apply to persons and equipment while actually engaged in work upon the surface of the highway. At the time of this occurrence, it is undisputed that the truck in question was spreading cinders upon the highway.

Third, there was no duty on the part of respondent to place warning flares on the highway, as sub-par. (b) of par. 218, Uniform Traffic Act, provides, "Whenever a motor vehicle of the second division is disabled during a period between sunset and sunrise, flares, lanterns, red

reflectors or other signals shall be lighted and placed upon the highway". There is no evidence that respondent's truck was disabled at the time of the collision, or that it was standing on said highway. All of the evidence indicates that the truck in question was moving, even though at only six miles per hour. There is no common law duty under these circumstances to place flares on the highway, and obviously the statute was not violated, as a reading of it reflects.

Fourth, with respect to the question of lights, claimant and her husband are in direct conflict with the two witnesses for respondent. These are the only witnesses offered by either side. None of them were impeached. The conflict in the testimony was on a specific and material point. The contradictions cannot be harmonized, nor is there room for construction. Obviously, one or the other of the two sets of witnesses have either testified falsely, or were mistaken. It would be sheer speculation for us to say which is the correct version.

In view of this state of the record, the evidence is evenly balanced on the question of the presence or absence of the lights required by law, and claimant has, therefore, failed to bear the burden of proof on this allegation of negligence.

In *Ackley vs. State*, 22 C.C.R. 41, we were confronted with a similar situation regarding the question of burden of proof, when the evidence was in irrevocable conflict. We there reviewed the law on the question, and followed the rule set forth in *Brady vs. Chaffee*, 163 Ill. App. 242, which has many times been applied. Quoting from a portion of that decision at page 46 in the *Ackley* case:

"An affirmative statement by one witness, met by a flat categorical denial by another, of equal credibility, does not meet the elementary requirement of the law that a plaintiff must make out his or her case by a preponderance of the evidence."

Consequently, in view of the fact that claimant has failed to bear the burden of proof placed upon her by the law governing such cases, we must deny her claim.

(No. 4823—Claim denied.)

ALEXANDER STORTS, A MINOR, BY LOUISE STORTS, HIS MOTHER AND NEXT FRIEND, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1960.

GIAMBRONE AND COHEN, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; Lester Slott, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*personal injuries*. Evidence failed to establish any negligence on the part of respondent for injuries sustained when seed lodged in eye of claimant, while stacking bales of hay.

SAME—*duty to safeguard*. Respondent is not required to take greater care than that exercised by others doing like tasks.

WHAM, J.

Claimant, Alexander Storts, a minor, 17 years of age, while an inmate of the St. Charles Reformatory, received an injury to his right eye, which ultimately required its removal, and brings this action against respondent in the sum of \$7,500.00 to recover damages by reason thereof. Claimant at the time of his injury was picking up bales of hay, which had been ejected from a hay baler, and loading them onto a flat bed wagon, approximately four feet high, at the Illini State Boys Camp at Marseilles, Illinois.

He testified that, as he was lifting a 125 pound bale of hay, hay seed and dust from it lodged in his right eye; that his eye immediately began to hurt, and he was told by the man in charge to cease working and sit in the station wagon. He remained at the field for about four hours before returning to the camp where he reported

to a staff member, who told him "to take it easy and it would come out".

He could not sleep well that night, and the eye was painful. The following day it was very red, and the staff member took him to Dr. Dunn at Marseilles for treatment and medication. The next morning his eye had turned white, and he was sent to the Eye, Ear and Nose Clinic in Chicago for treatment, and eventually the eye was removed on October 30, 1956.

The Departmental Report offered in evidence by respondent as exhibit No. 1 states that the matter was first called to the attention of respondent several days after September 17, when he reported the condition to the camp director, Mr. Clem Smith. When this was brought to the attention of Mr. Smith, the boy was examined by Dr. Dunn at Marseilles on September 19, 1956. The report then confirms the fact that the eye was eventually removed.

Claimant charges in his complaint that respondent negligently failed to supply him with a reasonably safe place to work, and negligently failed to supply him with safe protective equipment or goggles, so as to protect his eyes from injury from seeds, straw and foreign objects, which were continually being discharged from the automatic baling machine. As a proximate result thereof, a foreign object, piece of debris, or hay seed was caused to be thrown into his right eye resulting in its eventual removal.

Neither claimant nor respondent filed briefs, claimant having requested the Court for permission to waive the filing of briefs, which request was granted.

The only testimony in the record pertaining to the occurrence was that of claimant. He testified on direct examination on this point as follows:

“Q. When you were lifting them, did any part of the bale come out?

A. Just hay seed and dust came out. Some of it got in my eye. It happened a few times. Usually I got it out.

Q. What, if anything, happened while you were lifting this bale of hay on this day, September 17, 1956; what, if anything, happened to you while you were so lifting these bales?

A. I got hay seed in my eye. I knew it was in there. I told the guy that was in charge, Mr. Flowers, I think his name was.”

From the above, it is apparent that the hay seed was not caused to be thrown into his eye by the baler, as is charged in the complaint. Moreover, there is no evidence that he was required to work directly in the stream of hay seed and debris coming from the baler. His only duty at the time of this occurrence was to pick up the bales after they were ejected from the moving baler and load them on the wagon. Consequently, the stream of hay seed from the baler was not the proximate cause of this occurrence. On this point, he stated that the hay seed came from the bale of hay, which he was lifting.

With respect to the contention that respondent did not furnish claimant with a safe place to work, we find that the evidence does not establish this charge. It is common knowledge that 17 year old boys have always performed similar work on the farms throughout this State, and there is nothing in this record to establish that claimant was incapable of likewise performing such work.

With respect to the charge of negligently failing to supply goggles or other protective equipment, we find that there was no duty on the part of respondent to do so.

To hold otherwise would require that respondent do that, which commonly is not done by farmers engaged in the loading of bales of hay onto a wagon. No evidence was introduced to establish any extraordinary conditions that would require the supplying of goggles.

If we were to hold respondent liable in this case, our decision would of necessity apply the standard of absolute liability, which is not the law of Illinois.

As in the case of *Dargie vs. Eust End Boulders Club*, 346 Ill. App. 480, this case is one of those involving an injurious occurrence for which the law furnishes no redress, since the misfortune of claimant is not attributable to any fault on the part of respondent.

In the above case the court cited with approval a quotation from a Minnesota case, *Dahl vs. Valley Dredging Co.*, at page 491 of the opinion. Although the factual situation in this case differs from the instant case, the court therein set forth what seems to us to be an excellent statement of the test to be applied in this case. The court stated as follows:

“* * * The care taken by people generally to prevent injury from articles in common use is a proper guide for the courts in determining what constitutes due care in respect to such articles. The law does not exact a degree of care in guarding any article, which will make the great majority of the possessors of that article chargeable with habitual or continuous negligence. Due care in any case is the care usually exercised by men of ordinary prudence in like cases and under like circumstances. This is the standard by which the conduct of those charged with negligence is measured.”

Consequently, we must deny this claim for the reason that the evidence fails to establish that respondent was negligent, as charged in the complaint.

(No. 4837 — Claimant awarded \$806.38.)

**HAWKEYE-SECURITY INSURANCE COMPANY, A CORPORATION,
Claimant, vs. STATE OF ILLINOIS, Respondent.**

Opinion filed January 12, 1960.

GILLESPIE, BURKE AND GILLESPIE, Attorneys for Claimant.

GRENVILLE BEARDSLEY, Attorney General; William H. SOUTH, Assistant Attorney General, for Respondent.

TAXES AND FINES—overpayment of insurance taxes. Evidence showed claimant entitled to recover overpayment pursuant to Section 414 of the Insurance Code.

TOLSON, C. J.

On August 21, 1958, claimant filed a complaint alleging that taxes on the net receipts of its agencies, as provided in Section 414 of the Illinois Insurance Code, in the amount of \$806.38 had been mistakenly overpaid, in that claimant failed to claim a deduction in said amount for fire department taxes paid in 1956.

The Departmental Report substantiates the allegations of the complaint, and it appears as though there is no doubt but what claimant is entitled to such credits.

An award is, therefore, made to claimant in the amount of \$806.38.

(No. 4847—Claimant awarded \$5 33.89.)

VILLAGE OF BARRINGTON, A MUNICIPAL CORPORATION, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1960.

THOMAS A. AND BYRON S. MATTHEW'S, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; **Samuel J. Doy**, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that there were sufficient unexpended funds remaining at time appropriation lapsed, an award will be made.

WHAM, J.

This claim arises by reason of the lapse of an appropriation prior to the payment of an amount due the Village of Barrington by the State of Illinois. At the time the appropriation lapsed, there were sufficient unexpended funds available to cover the amount of the claim.

There is no dispute that the amount is due and

owing, and respondent's Departmental Report filed herein supports claimant's contention.

The matter was heard by Commissioner Herbert G. Immenhausen, and, after studying the report, exhibits, and evidence, we concur with Commissioner Immenhausen's recommendation that the claim be allowed, and herewith adopt his report as our opinion in the cause:

"The Village of Barrington, A Municipal Corporation, by Thomas A. Matthews and Byron S. Matthews, its attorneys, filed a complaint with the Court of Claims on November 22, 1958 alleging that it entered into a written agreement on June 29, 1956 with the Department of Public Works and Buildings, Division of Highways, of the State of Illinois, to perform maintenance and snow removal work on those parts of State Routes Nos. 63 and 59 lying within the corporate boundaries of said Village. (Copy of said agreement attached as exhibit A.) The authority for said agreement is granted by Chap. 121, Par. 296d, Ill. Rev. Stats.

Exhibit B correctly and accurately states the cost of the work done. The cost of the work was \$533.89, and is due and owing. This case came up for hearing on March 4, 1959. Respondent did not file an answer to said complaint, but filed a Departmental Report of the Division of Highways. In it the Division admitted entering into the contract, and that the work was done, but the contractual obligation was performed between July 1, 1955 and June 30, 1957, and was payable from the 69th biennial appropriation, which lapsed on September 30, 1957. The bill for the work was not received until May 29, 1958, which was after the appropriation had expired.

Complainant called as a witness, Paul Purcell, who testified he was Superintendent of Public Works of the Village of Barrington, and that he had supervision of the Street Department. He identified exhibits A, B and C. He testified that the work was done under said contract, and that the charge was fair and reasonable. It appears from the evidence and exhibits that the work contemplated was satisfactorily done, and the only reason it was not paid was because the bill was not presented and certified before the appropriation lapsed on September 30, 1957. I recommend that an award be made to the Village of Barrington for \$533.89."

The claim of the Village of Barrington, A Municipal Corporation, is, therefore, allowed in the sum of \$533.59.

(No. 4864—Claimants awarded \$242.50.)

EMMETT E. PARKS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1960.

MAYRON R. CRENSHAW, Attorney for Claimant.

GRENVILLE BEARDSLEY, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—operation of vehicle. Evidence showed motor vehicle of the National Guard was operated in a negligent manner, thus entitling claimant to an award.

TOLSON, C. J.

On March 2, 1959, Emmett E. Parks filed his verified complaint in this Court seeking an award for damages to his automobile alleged to have been caused by a member of the Illinois National Guard.

The record consists of the complaint, bill of particulars, Departmental Report, transcript of evidence, exhibits, and Commissioner's report.

There appears to be no serious dispute concerning the liability of respondent, and the report of the Commissioner in the following words and figures is hereby adopted by the Court:

"The evidence in the above entitled cause was taken on September 25, 1959, in the City of Chicago, Illinois. Mayron R. Crenshaw represented claimant, Emmett E. Parks, and Lester Slott, Assistant Attorney General, represented respondent, the State of Illinois.

The claim is for damages arising out of an automobile accident.

On June 3, 1958, at about 8:30 P.M., claimant, Emmett E. Parks, was parked on the west side of Wentworth Avenue, Chicago, Illinois. The parked vehicle belonging to claimant was a 1953 Chevrolet. It appears that Anthony Stewart, a member of the Illinois National Guard, drove a 2% ton truck from a garage on the east side of Wentworth Avenue across Wentworth Avenue, and, in attempting to make a right turn, struck the parked vehicle belonging to claimant.

The total damages came to \$288.50. However, when Merit Chevrolet Inc., who repaired said vehicle, found that an insurance company was paying for the claim, it allowed a discount of \$46.00, so that the total damage amounted to \$242.50. Claimant has a \$50.00 deductible interest,

and the Government Employees Insurance Company has a subrogation interest amounting to \$192.50.

Claimant, Emmett E. Parks, was the sole witness at the hearing, and testified to the occurrence. His testimony was substantially similar to the allegations in the complaint. The State did not introduce the testimony of any witnesses, but did introduce a Departmental Report as an exhibit.

On the basis of the evidence, it appears that respondent, the State of Illinois, is guilty of negligence as a result of the acts of its agent, Anthony Stewart, a member of the Illinois National Guard. Claimant does not appear to have been guilty of contributory negligence. He was legally parked.

It is, therefore, recommended by this Commissioner that the Government Employees Insurance Company be awarded the sum of \$192.50, and claimant, Emmett E. Parks, the sum of \$50.00, his deductible interest."

Awards are, therefore, made to the Government Employees Insurance Company in the sum of \$192.50, and to claimant, Emmett E. Parks, in the sum of \$50.00.

(No. 4867—Claimant awarded \$377.86.)

FRANK DROGOS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* January 12, 1960.

LEON L. MAZOR, Attorney for Claimant.

GRENVILLE BEARDSLEY, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

STATE PARKS, FAIRGROUNDS, MEMORIALS AND INSTITUTIONS—loss of possessions of patient while in custody of State. Evidence showed respondent was bailee of ring belonging to claimant's wife, which was lost, entitling claimant to an award.

DAMAGES—set-off. Where evidence showed claimant was indebted to State, a set-off was allowed.

WHAM, J.

Claimant contends that his wife's \$491.00 ring was lost by the negligence of respondent's agents at the Chicago State Hospital on or about February 15, 1958, while his wife was a patient of the hospital.

Claimant was the only witness, who testified in this case and it was admitted in the Departmental Report

that the ring was missing while in the custody of respondent.

During the hearing it developed that claimant was indebted to the Department of Public Welfare in the amount of \$113.14 for hospital care for his wife. Counsel for claimant consented to this amount being considered as a set-off, although not pleaded by respondent.

The facts appearing from the evidence offered herein are as follows: On February 15, 1958 Mrs. Frances Drogos, wife of claimant, Frank Drogos, was a patient at the Chicago State Hospital. She was home visiting her family on February 15, when, due to her condition, it was necessary to return her to the hospital. Upon entering the hospital, she was placed in the care of Theresa Willie and Lucille Wohler, two nurses at said hospital. Claimant was informed by the nurses that it would be better if he left after he had placed his wife in their custody. While in the care of the said nurses, two rings were removed from the fingers of Frances Drogos. One of the two rings was either lost or misplaced by one of said nurses, as it was never turned over to the administrators of the hospital. It is admitted in the Departmental Report that said ring has been lost.

The ring in question consisted of a white gold band set with fifteen diamonds, and was valued at \$491.00. This is the amount, which claimant paid for the ring approximately three or four years prior to its loss.

From these facts we conclude that respondent, as bailee of the ring, was guilty of negligence in caring for it, and, as a proximate result thereof, the ring was lost. Therefore, claimant is entitled to damages in the amount of \$491.00, the value of the ring.

It appears from the evidence, however, that re-

spondent, State of Illinois, is entitled to a set-off, or a counterclaim against claimant, Frank Drogos, since he owes the Department of Public Welfare the sum of \$113.14 for the hospital care of his wife.

It is, therefore, the opinion of this Court that claimant is entitled to the sum of \$377.86, after deducting the set-off from the value of the ring.

The claim is, therefore, allowed in the amount of \$377.86.

(No. 4825—Claimants awarded \$320.14.)

W. H. BROWN AND MOTORS INSURANCE CORPORATION, SUBROGEE OF W. H. BROWN, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 24, 1960.

TRAEGER, BOLGER AND TRAEGER, Attorneys for Claimants.

GRENVILLE BEARDSLEY, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—negligent operation of motor vehicle. Evidence showed that motor truck was negligently operated by a member of the Illinois National Guard, entitling claimants to an award.

FEARER, J.

Complaint was filed in this case by W. H. Brown and Motors Insurance Corporation, as subrogee, against respondent.

Respondent not having filed an answer, under Section 11 of the Rules of this Court a general traverse of the allegations of the complaint will be considered filed.

Abstracts, briefs and arguments were waived by this Court. Respondent filed a Departmental Report.

The accident on which this cause of action arose occurred on June 11, 1956. On that date W. H. Brown was the owner and operator of a 1955 Oldsmobile, which

he was driving in a northerly direction in the 4400 block on North Western Avenue, a public highway located in the City of Chicago, County of Cook and State of Illinois.

At said time and place aforesaid, a National Guard truck being driven by Karl Brun had been parked on the east side of Western Avenue, while the driver was asking directions from a police officer. As the Brown automobile approached the National Guard truck on the left and rear, the operator of the truck, without making a signal, made a left-hand turn in attempting to make a "U" turn in the center of Western Avenue while the front part of claimant's automobile was near the front portion of the truck. The truck struck claimant's automobile on the right-hand side, and damaged it.

The only testimony, which we have in this case, is that of claimant. He was examined by his counsel and by the Commissioner, Herbert G. Immenhausen, as to the facts of said accident.

Claimant's exhibit No. 1 was a paid repair bill of Sheair Motors Company of Chicago, Illinois in the amount of \$320.14.

The Commissioner so found, and there is no question but that the cause of the accident in question, resulting in the damage to claimant's automobile, was the result of the improper turn made by the National Guard truck driver, Sergeant Brun.

Claimant, W. H. Brown, had a \$50.00 deductible policy with Motors Insurance Corporation.

Motors Insurance Corporation paid to Sheair Motors Company the sum of \$270.14, and claimant paid the sum of \$50.00.

Awards are hereby made as follows:

W. H. Brown, \$50.00.

Motors Insurance Corporation, subrogee of W. H. Brown, \$270.14.

(No. 4655—Claimants awarded \$1,627.50.)

MARVIN KERR AND MOTORS INSURANCE CORPORATION, Claimants,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed *January* 12, 1960.

Petition of *claimants* for rehearing denied April 25, 1960.

LANSDEN AND LANSDEN, Attorneys for Claimants.

GRENVILLE BEARDSLEY, Attorney General; C. ARTHUR
NEBEL AND WILLIAM H. SOUTH, Assistant Attorneys Gen-
eral, for Respondent.

NEGLIGENCE—*evidence of other accidents at same location.* Where issue as to whether respondent had such actual knowledge as to constitute notice of possibility of injury as a result of its actions was pertinent, previous similar occurrences may be shown as evidence of knowledge, and absence of prior occurrences to demonstrate lack of it.

HIGHWAYS—*negligence.* Evidence showed that respondent was negligent in not warning the public traveling on an old highway of its relocation.

SAME—*notice of relocation of highway.* The State in relocating, repairing or changing a highway, where such action creates a hazardous condition, is bound to use reasonable diligence to warn the traveling public of the hazard.

PRACTICE AND PROCEDURE—*consideration of evidence.* The Court of Claims not only passes upon questions of law, but is a trier of the facts in each individual case as well. As trier of the facts, it weighs the evidence and makes awards accordingly.

FEARER, J.

Marvin Kerr and Motors Insurance Corporation filed their complaint against the State of Illinois on November 9, 1954. Marvin Kerr is seeking to recover \$4,000.00 for personal injuries, wrecker expense, loss of earnings, and the deductible portion of his collision policy with Motors Insurance Corporation. Motors Insurance corporation, under its subrogation agreement with Marvin Kerr, is seeking to recover \$530.00.

The claims are an outgrowth of an accident, which occurred on November 11, 1952 at or about the hour of 10:00 P.M., while claimant, Marvin Kerr, was driving his 1952 Pontiac automobile in a southerly direction on Illinois State Route No. 2, also **known** as U. S. Route No. 51, south of the city limits of Carbondale, Jackson County, Illinois, at or about one-half mile from said city limits.

The pertinent portions of the record are a verified complaint, transcript of evidence, briefs and arguments of respondent and claimant, including a reply brief of claimant.

No answer was filed by respondent. Therefore, in accordance with Rule 11 of this Court, a general traverse or denial is considered to have been filed.

In the complaint it is alleged as follows:

That at the time and place aforesaid, and at all times hereinbefore and hereinafter mentioned, claimant, Marvin Kerr, was in the exercise of due care and caution for his own safety and the safety of his automobile ;

That the respondent was constructing, completing and relocating State Route No. 2 to the east and southeast of the original older Route No. 2 ;

That it was also constructing and completing a curve and approach leading from Route No. 2 in a southeasterly direction to connect it with the highway on the relocation of said Route No. 2 ;

That there were no warning signs, flares or guard rails where Route No. 2 ceased to continue in its former straight condition, and proceeded in a curve and approach to the east and southeast;

That claimant, Marvin Kerr, while driving in a

southerly direction, didn't know of the change in Route No. 2, or the curve and approach leading from said Route No. 2 and connecting with the highway on the relocation of Route No. 2;

That, while attempting to stay on said curve and approach, he drove his said automobile off of the curve and approach down the embankment and into the low area between the embankment of the relocation of said Route No. 2 and the embankment of the curve and approach.

Respondent was charged with several acts of negligence in sub-paragraphs of the complaint, all of which amounted to the relocation of said highway by respondent, and making the connection therewith without giving adequate warning or providing sufficient lighting or signs warning the traveling public of the change in condition, which was the proximate cause of claimant, Marvin Kerr, running off of said highway and into a tree causing his injuries and the property damage to the automobile, the latter being the basis of the claim of Motors Insurance Corporation.

At the time of the accident Marvin Kerr was selling holiday goods, novelties and articles for the gift trade. Also, he was operating a tavern at Elco, Illinois.

Claimant alleged he sustained injuries to his ribs, back and muscles, and cuts and abrasions, for which he incurred hospital, doctor and nursing bills, as set forth in certain exhibits; also, damage to his automobile, as set forth in certain exhibits.

There is no question but that this section of the highway south of Carbondale was under the jurisdiction of respondent, namely the Department of Public Works and Buildings, acting through the Division of

Highways, from the time of its initial construction to the present time.

From the Departmental Report it appears that, as of October 22, 1952, traffic on S.B.I. Route No. 2 (marked Route U. S. No. 51) was routed over the following streets in the City of Carbondale:

From north to south—South Illinois Avenue to its intersection with Grand Avenue; west on Grand Avenue to its intersection with South Thompson Street; south on South Thompson Street to the south city limit; thence along a continuation of South Thompson Street, which is the centerline of land sections Nos. 28 and 33, a distance of more than one and one-quarter miles.

On November 20, 1951, the Department of Public Works and Buildings awarded a paving contract to the Triangle Construction Company. The contract bears the designation State Bond Issue Route No. 2, Section 9-1, Jackson County, and represents a relocation of S.B.I. Route No. 2 (marked Route U. S. No. 51) over a distance of 1.54 miles.

The relocation begins at the intersection of South Illinois Avenue and Grand Avenue in Carbondale, and follows a southerly and southwesterly course to a point of common meeting with the centerline of original S.B.T. Route No. 2 (marked Route U. S. No. 51). The point of common meeting is 1.21 miles south of Grand Avenue, and 1.1 miles south of the south city limit of Carbondale.

Since the angle of intersection of the old and relocated alignments is very small, the Division planned and constructed a connection between the old and new alignments at a point 1,015 feet due north of their common point of meeting. The connection consists of a portland cement concrete pavement 18 feet in width on a

curve having a radius of 150 feet, a length of 185.5 feet, and a grade of 5.8 per cent.

The relocated section of S.B.I. Route No. 2 (marked Route U. S. No. 51) was opened to through traffic on October 23, 1952. All route and direction signs and markers had been removed from the old location, and re-erected on the new location before October 23, 1952. The concrete connection between the south end of the old route and the new location was laid on November 3, 1952, and opened to traffic on November 10, 1952. A "stop" sign was erected on the southerly shoulder of the connection near its junction with the new location. The sign faced to the west, and was in place at the time the connection was opened to traffic, as well as when the subject accident occurred.

Claimant, Marvin Kerr, testified that he had not been in Carbondale for five or six months, and was not familiar with the relocation of said highway; that he lived in Elco, Illinois, and that his route in selling novelties usually covered Pulaski and Alexander Counties, but, this being the holiday period, he was making an extra trip coming through Vienna and Marion and over to Carbondale. At the time of the accident he was returning to his home in Elco.

The route, which he followed in coming into Carbondale, was across Route No. 13, and after getting into Carbondale he drove on University Avenue. He turned right, and drove down Thompson Street. The street north of University Avenue was Grand Avenue, and he continued on Grand Avenue to Thompson Street, which was known as old Route No. 51. He testified that this was the route, which he usually traveled when going through Carbondale, and that he did not know that the road had been changed, and the new highway

completed. While he was driving approximately forty miles an hour, it suddenly appeared to him that there was an open bridge in front of him. He applied his brakes, and "scooted" right off of the bank. He further testified that on this particular curve, which he described as a 90 degree curve, there were no signs or signals warning him of the curve, and there were no flares or barricades on this strip of highway before the curve. He didn't attempt to turn his wheel before making the curve, but he ran straight off of the road up against a tree, which threw him out of his car on the right side.

Claimant called Elza Brantley of Murphysboro, Illinois, who was employed by the Department of Public Safety as a Lieutenant in the State Police, and was in charge of District No. 13. He testified that at the time of the accident he was a State Sergeant, supervising the men in the field, and had made an investigation of this accident. It was his recollection that, at the time the new road was opened, all of the signs were taken down from old Route No. 51, which traveled past Southern Illinois University. They were moved over to the new highway, which had been opened for approximately ten days, and that, when he traveled to the scene of the accident, he traveled the old route, which was the one claimant had taken the night of the accident.

He further testified that, where the old road connected onto the new road, there was a ninety degree curve, that there were no warning signs or protective guard rails whatsoever at the curve where the accident happened warning the motorists traveling on the old route as to the dangerous condition where the connection was made. The only sign, which was in evidence,

was a stop sign, which was south of where the accident happened.

The State did not erect barricades at the south edge of the city limits of Carbondale closing off traffic when the new route was opened. The only testimony as to any signs indicating that the road had been opened were in Carbondale, and were testified to by the one witness called by the State, Mr. A. B. Harris of Carbondale, who was a Field Engineer for the Division of Highways. He testified as to the relocation of Route No. 51 around Southern Illinois University. He stated that the new road had been opened on October 23, 1952, and that by the opening of the new road it changed the route traveled through Carbondale from Grand Avenue south. He further testified as to the curve and the condition of the road at the scene where the accident occurred.

This Court has held several times that the State is not an insurer of all people, who travel on its highways, and when unexpected hazards occur, which could not reasonably have been foreseen, recoveries have been denied. *Dale Riggins vs. State of Illinois*, 21 C.C.R. 434.

We also held in the same case that, where the State is in the process of repairing, removing, or relocating a highway, it is duty bound to use reasonable care in warning the traveling public of a hazard, which it has voluntarily created. (Ibid. p 438.)

Respondent apparently is relying upon the fact that for approximately ten days traffic was re-routed through Carbondale, and that, had claimant followed the routings, which were changed by the relocation of the highway, he would not have been driving on the old road past Southern Illinois University, and would not have been confronted with this hazardous condition, negotiating a ninety degree curve in driving onto the new road.

On the other hand, we have claimant's testimony that he had not been in Carbondale for several months, and that he had always taken the old Route No. 51, which took him past Southern Illinois University. He had no warning, and did not have knowledge that the road had been relocated, and was following the route, which he had taken on other occasions. This apparently was true of other persons, who had had similar accidents at this same curve.

The question has arisen as to the admissibility of certain evidence offered by claimant as to other accidents on the same curve. This evidence was admitted subject to the objection of respondent. Other occurrences at the same location were testified to by Donald Shadows and Henry Hale, the Assistant Chief of Police of Carbondale, who also investigated this accident, and testified to other accidents occurring on this particular curve during the relocation of the highway.

In the case of *Hays vs. Place*, 350 Ill. App. 504, 510, "Where issue as to whether defendant has such actual knowledge as to put him on notice of possibility of injury as a result of his actions was pertinent, previous similar occurrences might be shown as evidence of defendant's knowledge, and absence of prior occurrences to show his lack of knowledge".

We believe that the evidence offered was sufficient to put respondent on notice that failure to warn the traveling public on the old highway, while it was still open, did create a hazardous condition, and would subject the traveling public to a serious condition.

As to the action taken in the erection of signs after the accident in question, we have had occasion to pass on this question before. *Bovey vs. State of Illinois*, 22 C.C.R. 95.

In the Departmental Report, it is stated that, at the time of the opening of the new road, all direction signs and markers were moved from the old location, and re-erected at the new location.

Respondent is also relying upon the question of contributory negligence in addition to its defense of the relocation and the markings for the relocation of the new highway, but, from examining the testimony and the exhibits offered in evidence, we are of the opinion that claimants have maintained the burden of proving to our satisfaction that Marvin Kerr was free from any contributory negligence. It is our opinion that respondent did not adequately warn traffic traveling on the old route through Carbondale, or within a reasonable distance prior to the connection between the old and the new routes, by placing a curve sign or other signs warning the traffic traveling on said highway of the dangerous curve whereby the connection is made between the two highways. Its failure to provide adequate warning signs or barricades to keep traffic off the old route was the proximate cause of the accident resulting in claimant's injuries and the damage to his automobile.

The State in relocating, repairing or changing a highway, where such action creates a hazardous condition, is bound to use reasonable care in warning the traveling public of the hazard, which it has voluntarily created. *Riggins vs. State of Illinois*, 21 C.C.R. 434, 438.

As to the question of damages to be awarded the Motors Insurance Corporation by reason of its subrogation, it was stipulated that the cost of repair to the automobile was \$577.50, that Marvin Kerr had a \$50.00 deductible policy, and that he paid \$50.00, and his insurance company paid \$527.50.

Claimant, Marvin Kerr, offered and, there were received in evidence, exhibits in the following amounts:

Exhibit No. 1—Bill of Ellis R. Crandle, M.D.....	\$16.00.
Exhibit No. 4—Holden Hospital	48.15.
Exhibit No. 5—Ryan Funeral Home, ambulance service.....	15.00
Exhibit No. 6—St. Mary's Hospital, Cairo, Illinois, x-rays.....	25.00
Exhibit No. 7—Dr. James K. Rosson, Tamms, Illinois	25.00.
Exhibit No. 8—Holden Hospital	15.00.

Marvin Kerr testified that at the time of the accident he was operating a tavern in Elco, Illinois. While he was being treated for his injuries, it was necessary for him to obtain additional help in his tavern. He employed one Shirley Cauble for a period of eight weeks, at \$25.00 a week, or a total amount of \$200.00.

He testified further that he had a loss of earnings in his novelty business through the holiday season for which he is claiming the sum of \$600.00. The testimony in this regard, even though not objected to, is speculative,, and claimant has not laid the necessary foundation for the offering and proving of loss of earnings from the novelty business.

As to the claim for the loss of the use of his car for two months, claimant is asking \$120.00. There is no showing in the evidence that he did rent another vehicle for the period of time that he was deprived of its use. Therefore, he did not maintain the burden of proof in this regard, as he would have had to show that after the holiday season he used the automobile in his business; that his automobile was not available for so many days; that during said period of time he rented another automobile, and paid a certain sum per day or week for its use in his business. Since claimant has failed to maintain the burden of proof as to damages for the loss of the use of the car, this Court cannot consider the item of \$120.00.

As to Marvin Kerr's injuries and the length of time he was absent from his employment, Dr. Ellis R. Crandle of Carbondale, Illinois was called to testify. He testified that he was summoned to the Holden Hospital on November 11, 1952, where he made an examination of Marvin Kerr. Mr. Kerr was complaining of pain in his right chest. Dr. Crandle testified that Mr. Kerr was put to bed on November 12, 1952. X-Rays, which were made, showed that he had a double fracture of the sixth rib, a fracture of the 7th rib, and a questionable fracture of the fifth rib on the right side. Other injuries consisted primarily of multiple abrasions and contusions. His pain was confined mostly to the right side of his chest. He was discharged from the hospital on November 14, 1952. The treatment given him was bed rest for three days, sedatives, and a tight binder to control the movement of the chest. The Doctor testified that he had not examined him since the date of the accident, which was the date of the first examination, but that he was x-rayed on September 26, 1955. The report of the radiologist at that time showed that there was a healed fracture of the sixth and seventh ribs in good position and alignment. The right thoracic cage showed a healed fracture of the fifth, sixth and seventh ribs in the posterior axillary lines, union was solid. There was no active destructive change, or evidence of recent fracture. There was a slight thickening of the pleura in the right lateral chest, which was most likely secondary to the old fracture. Dr. Crandle further testified that Mr. Kerr had made a maximum recovery from the accident.

This is the only medical testimony, which we have. Marvin Kerr testified that, when he got home, he called his family doctor, and that, after seeing him, he wore a harness to support his back and ribs.

There is nothing in the record as to the length of time that he was away from his employment, other than the testimony that he employed Shirley Cauble for eight weeks to assist him in his tavern, for which he paid \$200.00.

It is, therefore, the opinion of this Court that Motors Insurance Corporation should recover of and from respondent the sum of \$527.50, and that Marvin Kerr be awarded the sum of \$1,100.00.

SUPPLEMENTAL OPINION

This cause now comes on before the Court on a petition for rehearing, which was filed on February 24, 1960.

The petition requests a rehearing on the claim of Marvin Kerr, and pertains only to the extent of the award given to Marvin Kerr by this Court.

The Court, in arriving at the amount of the award, took into consideration the nature and extent of Marvin Kerr's injuries based upon the only medical testimony that was offered, and upon the testimony of claimant, as to his injuries, and giving to it the probative consideration, which we believed it was entitled to.

From the medical testimony, there is no question of permanency. The actual medical bills were very small. The only other testimony we had was that of Marvin Kerr himself, and, based upon all of this testimony, we considered that the award entered was adequate.

As to loss of earnings, we only considered that evidence, which we believed to be competent. In order to have made a larger award, we would have had to do so on evidence, which, in our opinion, was speculative, uncertain and remote, and not commensurate with the damages claimed by claimant.

Inasmuch as this Court not only passes upon questions of law in each individual case, but is a trier of the facts, and sits in the place of a jury, we reserve the right to give the evidence offered in each individual case that consideration, which we believe it is entitled to receive, and to make our award accordingly.

It is, therefore, the order of this Court that the petition for rehearing be denied.

(No. 4881—Claimant awarded \$2,000.00.)

SANKEY BROTHERS, INC., A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 25, 1960.

GILLESPIE, BURKE AND GILLESPIE, Attorneys for Claimant.

GRENVILLE BEARDSLEY, Attorney General; WILLIAM H. SOUTH, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where funds to pay balance of construction contract were on hand at time contract was entered into, but were not reappropriated by the Legislature, an award will be made.

TOLSON, C. J.

On August 12, 1959, Sankey Brothers, Inc., A Corporation, filed its complaint seeking an award of \$2,000.00 for the balance due under a certain contract with respondent dated June 29, 1955. A stipulation of facts was entered into between claimant and respondent on December 11, 1959, which is hereinafter set forth in detail, and, on December 21, 1959, claimant and respondent entered into a joint motion to waive briefs, which motion was allowed.

The stipulation of facts appears in the following words and figures:

“(1) Verified complaint of claimant, and exhibits attached thereto.

(2) That claimant is an Illinois corporation, which was employed by the State of Illinois, acting through the Department of Public Works and Buildings on June 29, 1955, to furnish all labor, materials and equipment, and to complete all work necessary for the site development of two half blocks north and south of the new State Office Building at Springfield, Illinois.

(3) That pursuant to said agreement of employment a written contract was entered into by and between claimant and the State of Illinois on June 29, 1955, a true copy of which is attached to the complaint herein as claimant's exhibit A.

(4) That claimant completed the site development pursuant to the terms of said contract.

(5) That the amount owed by the State of Illinois to claimant, pursuant to said contract, after allowing all just credits, deductions and set-offs is \$2,000.00, which sum represents the remaining unpaid balance due and owing claimant under said contract.

(6) That claimant has demanded of the State of Illinois payment of the sum of \$2,000.00, and the State of Illinois through J. N. Gaunt, Chief of Construction, advised claimant on March 17, 1959 that the sum of \$2,000.00 was not reappropriated by the Legislature of the State of Illinois, and that said contract was considered closed by the construction office of the Department of Public Works and Buildings; that a true and correct copy of said letter is attached to the complaint herein, as claimant's exhibit B.

(7) That claimant filed an Application For a Certificate of Payment with the Division of Architecture and Engineering of the Department of Public Works and Buildings for the State of Illinois for the sum of \$2,000.00, a true copy of which is attached to the complaint herein as claimant's exhibit C; that the Division of Architecture and Engineering acknowledged receipt of said certificate, and further acknowledged that said amount of \$2,000.00 was due and owing from the State of Illinois to claimant as evidenced by a letter attached to the complaint as claimant's exhibit D.”

The Court, having considered the stipulation, finds that claimant is entitled to an award.

An award is, therefore, made to Sankey Brothers, Inc., A Corporation, in the amount of \$2,000.00.

(No. 4891 — Claimant awarded \$561.60.)

**ILLINOIS WATER SERVICE COMPANY, A CORPORATION, Claimant,
vs. STATE OF ILLINOIS, Respondent.**

Opinion filed April 25, 1960.

ADSIT, THOMPSON, HERR AND STROCK, Attorneys for Claimant.

GRENVILLE BEARDSLEY, Attorney General; WILLIAM H. SOUTH, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed sufficient funds were available when appropriation lapsed, a claim can be allowed.

TOLSON, C. J.

Illinois Water Service Company, A Corporation, filed its complaint seeking an award for water service furnished to the Illinois State Prison at Pontiac, Illinois.

It appears from the pleadings that the Water Company made an erroneous charge for service for the months of June, 1958 to June, 1959 to its loss in the amount of \$561.60.

A Departmental Report, which was filed herein, acknowledged the receipt of the water service and the correctness of the amount due. It further recites that, though the appropriation for contractual services lapsed on September 30, 1959, additional funds were available from the appropriation for contingencies to meet this bill.

A stipulation was entered into on March 8, 1960 between claimant and respondent acknowledging the validity of the claim and waiving the filing of brief and argument.

The Court, therefore, finds that claimant is entitled to an award in the amount of \$561.60, and an award is so ordered.

(No. 3025—Claimant awarded \$2,288.57.)

ELVA JENNINGS PENWELL, Claimant, **vs.** STATE OF ILLINOIS,
Respondent.

opinion filed June 17, 1960.

JOHN W. PREIHS AND EDWARD BENECKI, Attorneys
for Claimant.

WILLIAM L. GUILD, Attorney General; WILLIAM H.
SOUTH, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION Act—*supplemental award.* Under the authority of *Penwell vs. State of Illinois*, 11 C.C.R. 365, claimant awarded expenses incurred for medical and nursing services, drugs, etc., for the period from November 1, 1959 to and including April 30, 1960.

TOLSON, C. J.

Claimant was injured on February 2, 1936 in an accident, which arose out of and in the course of her employment as a Supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness and general paralysis. The facts are fully detailed in the case of *Penwell vs. State of Illinois*, 11 C.C.R. 365, in which an award of \$5,500.00 was made to claimant for total permanent disability, \$8,215.95 for necessary medical, surgical, and hospital services, expended or incurred to and including October 22, 1940, and an annual life pension of \$660.00.

Successive awards have been made by the Court from 1942 to and including October 31, 1959, and the matter is now before the Court for an award to and including April 30, 1960.

The record consists of a verified petition, supported by original receipts, and joint motion of claimant and respondent for leave to waive the filing of briefs and arguments, which has been allowed.

The petition alleges that claimant is still bedfast, and requires daily medical and nursing care. It further discloses that claimant has incurred expenses in the following amounts :

1. Nursing expenses	\$ 685.87
2. Room and board for practical nurses	318.50
3. Drugs and supplies	244.42
4. Physicians' services	802.00
5. Transportation	75.00
6. Miscellaneous expenses	162.78

From the previous record of this case, it appears that the Court has reserved jurisdiction of same from year to year to determine the future needs of claimant for additional care, and it further appears that the amounts involved were necessarily expended for the medical care of claimant.

An award is, therefore, made to claimant for medical and nursing services, and other expenses, from November 1, 1959 to and including April 30, 1960 in the amount of \$2,288.57.

The Court reserves jurisdiction for further determination of claimant's need for additional medical care.

CASES IN WHICH ORDERS OF DISMISSAL WERE ENTERED WITHOUT OPINION

- 4733 Marvin M. Jaffee, Et Al
- 4784 Frank Brunner
- 4803 Anna Ruschaupt
- 4807 Mildred Kempfert, Et Al
- 4811 The New York Central Railroad Company, A Corporation
- 4814 Elizabeth Pavey
- 4835 Mildred Musselman
- 4840 Geneva Conwill
- 4846 Ruth B. Ziegler, Admr., Etc.
- 4869 Willis White, Admr., Etc.
- 4876 Robert L. Lindsay
- 4883 Sheila Dunn
- 4886 Roscoe Nice, Et Al
- 4889 Town of Normal, A Municipal Corporation

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